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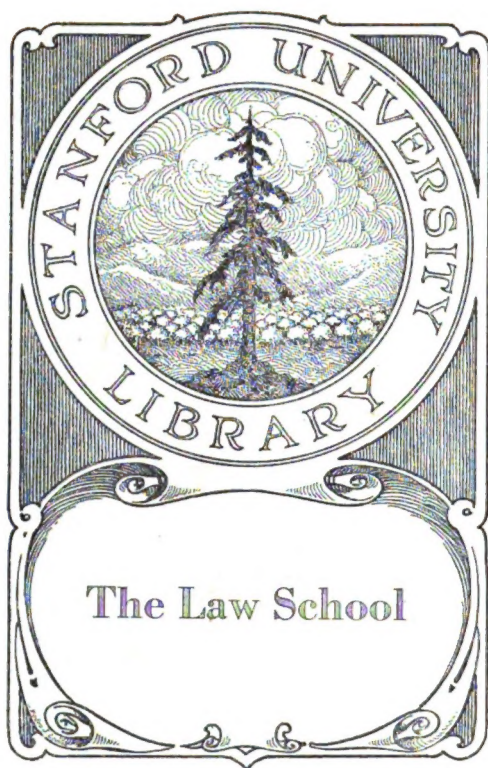
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XXIII.

CONTAINING

6 CHANCERY DIVISION, pp. 371-796.

7 CHANCERY DIVISION, pp. 1-730.

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Right Hon. LORD GORDON, " "

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Right Hon. Sir ALFRED HENRY THESIGER, ⁴	" "

¹ Died June 16, 1877: 12 Law Jour., 372.

² Retired on account of ill health October, 1877: 63 L. T., 417.

³ Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

⁴ Appointed Nov., 1877, in place of Lord Justice AMPHLETT: 12 Law Jour., 631.

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Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

¹ Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

² Resigned June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.

³ Appointed June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.

⁴ Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

⁵ Appointed January, 1879, in place of Baron CLEASBY: 14 Law Journal, 34; 66 Law Times, 191.

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AND BY THE
 CHIEF JUDGE IN BANKRUPTCY,
AND BY THE
 COURT OF APPEAL
 ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
AND IN
 L U N A C Y.

[6 Chancery Division, 371.]

V.C.B., March 7, 13, 14, 15, 19, 20, 21, 27; April 11, 12, 17, 18, 25: C.A., July 24, 27, 28, 31; Aug. 3, 6, 7, 8, 1877.

*BAGNALL V. CARLTON.

[371]

[1875 B. 224.]

Company—Profit made by Promoter—Fiduciary Relation—Contract not mentioned in Prospectus—Commission—Offer by Plaintiffs to allow Commission and Expenses—Solicitor of Company—Costs.

The plaintiffs were a joint stock company which was formed for the purpose of purchasing and working a colliery and ironworks formerly the property of J. Bagnall, deceased. Before the company was formed J. Bagnall's trustees entered into negotiations with R., a financial agent, to get up a company for the purchase of the property for about £300,000. R. applied to C., and C. made an arrangement with G. upon the terms stated below. Two contemporaneous agreements were signed, by one of which the trustees agreed to sell the property to a trustee for the company for £300,000; and by the other, which was called in the pleadings the secret agreement, the trustees agreed with C. that he should bring out the company or forfeit £20,000; and that they should pay £85,000 for commission and risk. On the same day C. agreed with G. that G. should take the whole risk of bringing out the com-

1877

Bagnall v. Carlton

C.A.

pany, and should receive £60,000 and C. £25,000 of this bonus. D. & Co., the vendors' solicitors, were to receive £1,500 from the tenant for life of the property if the purchase was completed.

The company was established, the first directors being found by R.; and D. & Co. become the solicitors of the new company. The prospectus and articles referred to the agreement for the purchase of the property, but made no mention of the agreement between the vendors and C., or of any of the arrangements relating to it. The purchase-money was paid to the vendors, who paid out of it £85,000 to C., of which he gave £60,000 to D. and £10,000 to R. The directors were not informed by D. & Co., or any other person, of the agreement between the vendors and C.; but some time afterwards they discovered it, and thereupon called a general meeting of the company to consider the subject. The result was that a bill was filed by the company against the vendors and against R., C., G., and D. & Co., praying that the purchase might be rescinded, or that the defendants might be held liable to repay all the profits which they had made by the transaction; the plaintiffs offering to allow expenses properly incurred and a fair commission.

Before the cause came to a hearing the plaintiffs compromised the suit with the vendors, receiving from them £31,000 as the price of not insisting on the purchase being rescinded:

Held (affirming the decision of Bacon, V.C.), that the suppression in the prospectus of the agreement between the vendors and C. was unjustifiable; and that the defendants R., C., and G. were in a fiduciary relation to the intended company, and therefore could not be allowed to retain any profit which they had made without disclosing it to the company:

Held, also, that the compromise with the vendors did not affect the claim of the 372] *plaintiffs against the defendants R., C., and G., and that the last named defendants had no claim to any allowance in respect of the £31,000 paid by the vendors on such compromise:

But *held* (varying the decision of the Vice-Chancellor), that the defendants R., C., and G., were entitled to be allowed their expenses properly incurred in bringing out the company; and that although they would not have been entitled to any commission unless the plaintiffs had offered to allow it in their bill, the plaintiffs could not retract their offer, and a fair commission must be allowed:

Held, also, that although D. & Co. had acted improperly in concealing from the company the agreement between the vendors and C., they ought to have been dismissed from the suit when the plaintiffs elected not to rescind the purchase; and inasmuch as D. & Co. had acted in the matter with no fraudulent intent, the court dismissed the suit against them without costs up to the time of the compromise, and with costs as to all subsequent proceedings.

THE bill in this suit was filed by John Bagnall & Sons, Limited, a company registered under the Companies Act, 1862, against James Carlton, Albert Grant, W. H. Duignan, L. W. Lewis, John Richardson (since deceased), C. F. Richardson, R. Bagnall, R. S. Bagnall, J. Nayler, E. Nayler, and G. Bytheway, for the purpose of setting aside a purchase of certain collieries and ironworks at Gold's Hill, West Bromwich, Staffordshire, or of compelling the defendants who had received commission or profits to refund.

The property and business formerly belonged to Mr. James Bagnall, and was under the management of Joseph Nayler and W. S. Nayler. Mr. Bagnall, in 1871, being desirous of selling the property, caused a valuation of it to be made by Messrs. Bird, who estimated the entire property and business to be worth £300,000. He also commissioned

Messrs. Bird to look out for a purchaser of the property, and promised them a commission of £60,000 if they succeeded. Mr. James Bagnall died in 1872, having by his will appointed his nephew R. S. Bagnall, Joseph Nayler and W. S. Neyler his trustees, with directions for the sale of his property.

Messrs. Duignan & Lewis were the solicitors of Mr. J. Bagnall, and on his death they acted as the solicitors of his trustees. Messrs. Bird not having succeeded in finding a purchaser, Mr. Richard Bagnall, who was tenant for life of the property under Mr. J. Bagnall's will, promised Mr. Duignan £1,500 as commission *if he should find a [373 purchaser for the property, and Duignan treated this as money coming to his firm. They accordingly put themselves into communication with Mr. John Richardson, who carried on the business of a financial agent and accountant in Manchester, in partnership with his son, the defendant C. F. Richardson. J. Richardson introduced Messrs. Duignan to the defendant James Carlton, a financial agent, also residing at Manchester; and an arrangement was made between Messrs. Duignan, on behalf of the trustees of Mr. Bagnall's will, that the defendant Carlton should bring out a joint stock company with a capital of £300,000, to purchase the collieries and business for £290,370, payable as to £150,370 in cash and bills, and as to £140,000 in debentures. If Mr. Carlton performed his part of the agreement, he was to be paid £85,000 by the vendors: if he failed he was to pay £20,000 as liquidated damages, and this sum was first to be deposited as caution money. This agreement was not made without considerable correspondence between the parties, and in a letter dated the 15th of October, 1872, in reply to a request by the defendant Carlton for an increased benefit on account of the postponement of the day of purchase, Messrs. Duignan wrote a letter containing the following paragraph, which is referred to in the judgment of Lord Justice Cotton:—

“We, of course, brought to the attention of the trustees your suggestion that any increase in the valuation and also the profits of the past year, minus interest on the purchase-money, should be deemed to belong to you as a further bonus for your trouble and risk. They, however, entertain a very strong objection to this. They are willing to give to the ultimate purchaser the advantage of these two items, and by so doing to put you in a position to offer the income to the public on terms so favorable as very greatly to narrow the risk of the property being left on your hands;

but they do not think they should be asked to increase the very handsome percentage first proposed to be allowed you. As far as their own trust is concerned, the result is of course the same, whether the benefit of these two items be taken by you or the purchasers ; but in the possible event of their testator's estate being ultimately administered under the 374] direction of the Court of *Chancery, they would feel great difficulty in justifying so very large a discrepancy between the nominal purchase-money and that actually received by them. Besides which they are naturally anxious for the success of the new company, and if the advantages under which they expected now to start are to be intercepted, they feel that they could not either retain any connection with it or be the means of recommending it to others. We trust, therefore, that on reconsideration you will not press for any alteration in this respect. If you require these further advantages, the only way will be for you to buy of the trustees at the net sum which they were content to receive, and then make your own bargain with the promoters of the company."

About this time Carlton applied to the defendant Albert Grant to join him in the enterprise, and to undertake the risk of getting up the company. After some negotiation it was agreed, in February, 1873, between the defendants Grant, Carlton, and the Richardsons, that Grant should undertake the whole risk and expense of getting up the company, and should advance Carlton the deposit of £20,000; and that as a compensation for his services he should receive £65,000; and Carlton £20,000, out of which however he was to pay Richardson £10,000.

It did not appear that the vendors or their solicitors had any knowledge of these arrangements, and on the face of the transactions they dealt with Carlton, Richardson appearing as his associate in the matter. Two agreements were drawn up and executed on the 6th of March, 1873. The first, the purchase agreement (in the bill called the ostensible agreement), was made between R. S. Bagnall, W. S. Nayler, and J. Nayler, trustees and executors of the will of James Bagnall, of the one part, and the defendant G. Bytheway, as a trustee on behalf of the intended joint stock company, of the other part, and thereby the trustees agreed to sell, and Bytheway, on behalf of the intended company, agreed to purchase, the good-will of the business and the collieries and property at Gold's Hill, with the plant, stock, and effects thereon, for the sum of £290,370, payable as therein mentioned, namely, £40,000 in cash, on the 15th of April, 1873, £110,370 in bills and promissory

notes of the company, and *£140,000 in debentures [375 of the company. The agreement contained various stipulations for carrying out the purchase, and among others that the company should have an option before the 15th of May, 1873, of requiring a re-valuation of the stock, and that the difference should be deducted from or added to the purchase-money; and that the title to the property should be investigated and approved by Messrs. Duignan & Lewis, as solicitors on behalf of the company.

The second agreement of the same date, the commission agreement (in the bill called the secret agreement), was made between the defendant Carlton of the one part, and the defendants R. S. Bagnall, W. S. Nayler and J. Nayler, of the other part, and thereby it was agreed that Carlton should before the 1st of April, 1873, form and cause to be registered a joint stock company to be called "John Bagnall & Sons, Limited," with the capital therein mentioned; that the company should on or before the 15th of April, 1873, execute under their common seal the before-mentioned agreement of even date, which was set forth in a schedule thereto, and should pay the sums of £40,000 and £110,375 therein mentioned, and that Carlton should immediately pay to the trustees the sum of £20,000 as a security for the performance of the agreement on his part. And the trustees agreed to pay to Carlton for his trouble and expenses in the negotiation and procuring the formation of the company the sum of £60,000, together with £25,000 in respect of the profits of the business from the 30th of September, 1871, the day when the valuation was made.

A third agreement was also executed on the same day between Messrs. Grant Brothers of the one part, and the defendant Carlton of the other part, in which Grant Brothers agreed to indemnify Carlton against all liability under the agreement of even date, and Carlton agreed to pay them all moneys which he was entitled to receive under that agreement, except the sum of £20,000, which he was to retain for himself. This agreement was not communicated to the vendors or their solicitors.

These agreements being signed, the defendant J. Richardson invited several persons, among whom were Mr. Sampson Lloyd, jun., Mr. Hanbury Barclay, and Mr. Edward Gem, to become directors of the company. A skeleton prospectus was prepared by *Messrs. Duignan & Lewis, and [376 sent to Carlton and the Naylers that they might fill up the blanks. At that time Messrs. Duignan & Lewis did not know that the defendant Grant was concerned in the matter,

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but the draft was sent by Carlton to him for approval. Messrs. Lloyd, Barclay and Gem, after some negotiation, consented to become directors of the company on the 15th of March, 1873, and W. S. Nayler and J. Nayler also consented, but Mr. R. Bagnall declined on the ground that he wished to be relieved from business. Messrs. Lloyd, Barclay and Gem were informed of the purchase agreement of the 6th of March, 1873, but not of the commission agreement with Carlton.

The memorandum and articles of association were dated the 15th of March, 1873, and the company was registered on the 21st of March. The first directors were Hanbury Barclay, Edward Gem, Sampson Lloyd, jun., W. S. Nayler and J. Nayler. The object of the company was stated to be, among other things, the carrying into effect the agreement of the 6th of March, 1873, between the trustees and Bytheway (the purchase agreement), and carrying on the business of ironmasters, coal miners, and kindred occupations. The capital was to be £300,000, divided into 30,000 shares of ten pounds each.

The prospectus gave the names of Messrs. Duignan & Lewis as solicitors for the company, and was signed by the defendant Charles F. Richardson as the secretary. At the foot of the prospectus was this memorandum: "The following contract has been entered into on behalf of the company: An agreement dated the 6th of March, 1873, between R. S. Bagnall and W. S. Nayler and J. Nayler, trustees of the late James Bagnall, of the one part, and G. Bytheway of the other part." No mention was made of any other contract.

As soon as the company was established the defendant Grant was at considerable expense in circulating the prospectus and in advertising and recommending the company. In his evidence he estimated the expense incurred in advertising as about £3,185; in printing and postage £1,540; and in incidental expenses about £1,000. He also paid Messrs. Duignan & Lewis £525 which had been agreed upon as their fee for their professional services in investigating the title and carrying through the purchase.

377] *A large number of shares were taken, and cash and debentures representing the purchase-money were paid by the company in accordance with the agreement mentioned in the prospectus, and the company entered into possession of the property. Out of the cash and debentures so paid, Messrs. Duignan & Lewis, as solicitors for the vendors, paid to John Richardson £85,000 in cash and debentures, and repaid the sum of £20,000 which had been deposited by

Grant on behalf of Carlton. Of this sum of £85,000, £65,000 was paid by J. Richardson to Grant, £10,000 to Carlton, and £10,000 retained by J. Richardson and by him brought into his partnership assets. Ultimately, however, Carlton appears to have received £12,500, and Messrs. Richardson £7,500 only. Two debentures of £500 each were also given by Grant to W. S. Nayler and J. Nayler to induce them to act as directors.

In April, 1873, John Richardson was appointed a director and became chairman of the company.

In January, 1874, W. S. Nayler died, having appointed J. Nayler and Edward Nayler his executors, and Edward Nayler was soon afterwards appointed a director.

Soon after the formation of the company the directors ascertained that a serious accident had happened to some of the works at Gold's Hill, before the purchase by the company, which they estimated at about £7,000, and they applied to Bagnall's trustees to make good the loss, which they refused to do.

On the payment of the purchase-money to the vendors, Duignan applied to R. Bagnall to pay him the £1,500 which had been promised him if he obtained a purchaser for the property, and on R. Bagnall refusing to pay, brought an action against him for the money. He eventually submitted to pay the money, and notice of trial of the action was withdrawn in July, 1873.

In consequence of this action, or for some other reason, the directors, other than J. Richardson and the Naylers, became suspicious as to the transactions prior to the purchase by the company, and a meeting of the board was called on the 2d of December, 1874, to consider the subject. At that meeting Mr. W. H. Duignan informed the meeting of the commission agreement of the 6th of March, 1873, and a few days afterwards, with the consent of Bagnall's trustees, he furnished them with a copy of it.

*In consequence of this disclosure the directors [378 called a meeting of the shareholders on the 27th of January, 1875, at which a committee of investigation was appointed, and on the 20th of May their report was presented to a general meeting. The committee reported that neither of the directors Barclay, Gem and Lloyd had any knowledge of the commission agreement till it was disclosed to them in December, 1874, and that it was purposely concealed from them and from the shareholders. They also reported that £85,000 had been paid to Mr. Carlton, £1,500 and £525 to Mr. W. H. Duignan, but that Mr. Duignan stated that the

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sum of £1,500 was paid to him by Mr. R. Bagnall in pursuance of an arrangement made with him in April, 1872, when that gentleman promised to pay that amount in addition to any professional charge if a sale of the property were effected to his satisfaction; and that Mr. Duignan explained the payment of the £525 by saying that at an interview with Mr. Carlton in February, 1873, he had, at Mr. Carlton's request, consented to act for the company in investigating the title to the property on payment of five hundred guineas for his professional services.

The result of the committee's report was that the present bill was filed by the company on the 1st of July, 1875, Messrs. Tucker & Lake acting as solicitors for the company in the suit, although Messrs. Duignan & Lewis remained solicitors for the company's general business for some time afterwards.

All the defendants, except Bytheway, put in answers to the bill, denying that they were promoters of the company, or that they had in any way contracted any fiduciary relation with the company, and alleging that the total price paid by the company was below the then value of the property, a statement which was not disputed by the plaintiffs.

On the 24th of February, 1876, the plaintiff company entered into a compromise with the defendants R. Bagnall and R. S. Bagnall, by which, in consideration of the payment of £31,000, the plaintiffs abandoned all claim for relief against them by rescission of the contract or for costs, except as therein provided, and agreed to consent to an order staying proceedings against them.

The plaintiffs, having effected this compromise, offered to refrain from asking for a decree against Duignan & Lewis if 379] they *would assist them in their proceedings against the other defendants. Messrs. Duignan & Lewis declined to accede to these terms, but offered to consent to the bill being simply dismissed against them without costs. The plaintiffs, however, proceeded with the suit against them.

The plaintiffs stated in the bill that they did not seek to impeach the payment of the £525 to Duignan & Lewis, but they claimed to be repaid the other sums, namely, the £1,500 paid to Duignan & Lewis, the £20,000 paid to Carlton, and the £65,000 paid to Grant (including the £1,000 paid to the Naylers), "except so much of the said sums as represented a fair remuneration for services rendered or expenses paid on behalf of the intended company." The bill prayed that the agreement for the purchase of the property might be set aside, and for an injunction to restrain the

defendants, other than Bytheway, from dealing with the debentures of the company; or that the defendants, other than Bytheway, might be decreed to be jointly and severally liable to repay the sums claimed, after deducting such sum as should be determined by the court to be a fair allowance for commission, and expenses properly incurred.

The defendant J. Richardson died before the cause came to a hearing.

The cause came on for hearing before Vice-Chancellor Bacon on the 7th of March, 1877.

The parties to the suit and other witnesses were examined at the trial at great length before the Vice-Chancellor.

Kay, Q.C., *Fry*, Q.C., and *Russell Roberts*, appeared for the plaintiffs.

Swanston, Q.C., and *Ingle Joyce*, for the defendant Carlton.

Sir H. Jackson, Q.C., and *Everitt*, for the defendant Grant.

Hemming, Q.C., *Cozens-Hardy*, and *Moulton*, for the defendants Duignan & Lewis.

W. W. Karlake, for the defendant C. F. Richardson.

Westlake, Q.C., and *C. T. Simpson*, for the defendant J. Naylor.

**Millar*, for the defendant E. Naylor. [380

Woodroffe, for the defendants R. Bagnall and R. S. Bagnall.

Kay, in reply.

The following cases were cited: *Imperial Mercantile Credit Association v. Coleman* ('); *Gover's Case* ('); *New Sombrero Phosphate Company v. Erlanger* ('); *Lindsay Petroleum Company v. Hurd* ('); *Panama and South Pacific Telegraph Company v. India Rubber Company* ('); *Great Luxembourg Railway Company v. Magnay* ('); *Kimber v. Barber* ('); *Knight v. Bowyer* ('); *Oakes v. Turquand* ('); *Bank of London v. Tyrrell* ('); *Dunne v. English* ('); *Clarke v. Dickson* ('); *Fawcett v. Whitehouse* ('); *Craig v. Phillips* ('); *Morgan v. Elford* ('); *In re Hereford and South Wales Wagon Company* ('); *Land Credit Company of Ireland v. Fermoy* ('); *Barnes v. Addy* ('); *McKay's*

(1) L. R., 6 H. L., 189; 6 Eng. R., 18.

(2) 1 Ch. D., 182.

(3) 5 Ch. D., 73; 21 Eng. R., 798.

(4) L. R., 5 P. C., 221; 8 Eng. R., 180.

(5) L. R., 10 Ch., 515; 14 Eng. R., 759.

(6) 25 Beav., 586.

(7) L. R., 8 Ch., 56; 4 Eng. R., 753.

(8) 2 De G. & J., 421.

(9) Law Rep., 2 H. L., 325.

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(10) 27 Beav., 273; 10 H. L. C., 26.

(11) L. R., 18 Eq., 524; 10 Eng. R., 837.

(12) E. B. & E., 148.

(13) 1 Russ. & My., 132.

(14) 3 Ch. D., 722.

(15) 4 Ch. D., 352.

(16) Law Rep., 17 Eq., 423.

(17) Ibid, 5 Ch., 763.

(18) Ibid, 9 Ch., 244; 8 Eng. R., 848.

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Case ⁽¹⁾; *In re Kensington Station Act* ⁽²⁾; *Pearson's Case* ⁽³⁾; *Peek v. Gurney* ⁽⁴⁾; *Orgill's Case* ⁽⁵⁾; *Hay's Case* ⁽⁶⁾; *Carling's Case* ⁽⁷⁾; *In re Bampton and Longtown Railway Company* ⁽⁸⁾; *Parker v. McKenna* ⁽⁹⁾; *Overend, Gurney & Co. v. Gibbs* ⁽¹⁰⁾; *Phosphate Sewage Company v. Hartmont* ⁽¹¹⁾.

BACON, V.C., after stating the facts above detailed, continued:

Some of the defendants have insisted that the plaintiffs' title to relief is barred by laches, delay, and acquiescence. 381] But, *considering the time at which the plaintiffs had any certain knowledge of the facts on which they rely, and that they have ever since pursued, not without difficulty, the inquiries which were requisite, I do not think any unreasonable delay can be imputed to them, or that there has been on their part anything like laches, or anything done or left undone by them in respect of which it can be said that either of the defendants has suffered any prejudice. And it is not even suggested that from the time at which their suspicions were first aroused, either the directors or the company have acquiesced in the things which are now complained of, or that with that full knowledge which is necessary to constitute acquiescence, in the sense in which the expression is properly used, they have forborne, or led any of the defendants to imagine that they intended to forbear, their claim to the relief they seek.

The facts which I have heretofore recapitulated are not in dispute between the parties to this action. I find it, therefore, unnecessary to dwell minutely upon the numerous letters which have been referred to in the course of the discussion, from which many of those facts are derived, or to the statements of the defendants in their several answers, or to the purport of the lengthened examinations which have been made. The allegation of the plaintiffs is, that each and every of the defendants was a promoter of the company, and that as a necessary consequence it was the duty of each of them to disclose fully and truly the circumstances under which, and the terms upon which, the sale to the company had been effected. This being denied by the defendants, it becomes necessary to consider first what constitutes a promoter of a joint stock company. The name

⁽¹⁾ 2 Ch. D., 1.

⁽²⁾ Law Rep., 20 Eq., 197.

⁽³⁾ 4 Ch. D., 222.

⁽⁴⁾ Law Rep., 6 H. L., 377.

⁽⁵⁾ 21 L. T. (N.S.), 221.

⁽⁶⁾ Law Rep., 10 Ch., 593.

⁽⁷⁾ 1 Ch. D., 115.

⁽⁸⁾ Law Rep., 10 Eq., 613.

⁽⁹⁾ Law Rep., 10 Ch., 98.

⁽¹⁰⁾ Law Rep., 4 Ch., 701; Law Rep., 5 H. L., 480.

⁽¹¹⁾ 5 Ch. D., 394.

is one of familiar use and application. It is found in several of the statutes relating to joint stock companies, and has been used and adopted by the court in several cases. I think, therefore, that without attempting to define it in any more certain manner than the occasion requires, it will be sufficient to consider whether what was undertaken and done by the several defendants can be referred to any other character than that of promoters. It is a fact undisputed that from the very first suggestion of a sale of the business and property, the subject of this action, it was the conviction and intention of all the persons engaged or interested in the matter that they should be sold to a company. It may be truly said that the sale and the formation of a company formed one complete entire idea. It was the intention of James Bagnall—the same intention actuated his trustees after his death—and it was with the same intention that Richard Bagnall, the tenant for life, engaged the services of Mr. Duignan, with the promise of a gift to him of £1,500 if he should succeed in effectuating such a sale—and for this purpose, and no other, the firm of Duignan & Co. were instructed and employed as the solicitors of the trustees, and acted in every step towards the accomplishment of that object. With this intention the communications were made by Mr. Duignan to Mr. John Richardson, and were by him made to Mr. James Carlton, and by Carlton to Grant; and it seems to me impossible to doubt that each of these persons—Richard Bagnall, the trustees of James Bagnall's will, Messrs. Duignan & Lewis, the two Richardsons, Carlton, and Grant—was employed and actively engaged in the formation of a joint stock company for the sole purpose contemplated by them. The negotiations with Richardson and Carlton were carried on by Duignan & Co., and were communicated by them to the Bagnalls. The negotiations between Richardson, Carlton, and Grant, were carried on by them for the same purpose. The agreements entered into by the vendors were prepared by Duignan & Co.; the prospectus of the intended company was prepared by them, transmitted to Mr. James Carlton, and submitted to the trustees, and known to and not disapproved of by them, since one of them made pencil alterations in it. That Richardson, Carlton, and Grant were busily and earnestly engaged in the formation of the company, is abundantly proved, and most unequivocally admitted. In the face of these plain facts, I can find no room or reason for doubting that the persons I have named, each and every one of them, must be taken to have been pro-

motors of the company, and to have carried into full and perfect completion their common design, that a company should be formed.

But, then, it is said, on the part of these defendants, that if it should be held that they were, or that either of them was, promoting the company, it is not a necessary or a legal consequence that they thereby contracted any fiduciary [383] relation with the company when *formed; and this, being a topic of universal interest, and of great public importance, is worthy of the closest consideration. The general law relating to those institutions, which in recent times have become so numerous, is contained in the several statutes which have been passed relating to them, and which prescribe the manner in which such companies are to be formed, the regulations necessary for the protection of the public, and the rights, *inter se*, of the shareholders. But besides that, and in addition to those regulations, and neither inconsistent with, nor repugnant to, the special enactments, the general law prevails and must be resorted to for the purpose of deciding any matters which may arise, and in which the members of such companies may be interested. The formation of such companies must, from its very nature, be in almost all cases the work of one or more individuals. It begins usually in an announcement of the nature of the proposed enterprise, the means by which its purpose may be effected, the amount of the intended capital, and of the number of shares into which that capital is to be divided, and the names of the persons who, as directors, secretaries, solicitors, bankers, and others, are to be concerned in its establishment. This announcement is familiarly called a prospectus. Its object is to induce persons to contribute their money for the purposes of the enterprise, and with that intent the prospectus is advertised and circulated by the persons who have conceived and projected its formation, and by whom the prospectus has been edited. It is obvious that such a document ought to be expressed with perfect veracity, and issued in good faith; and the suppression or withholding the statement of any fact materially relevant, would be as plain a failure of that perfect veracity, and as plain a departure from good faith as the assertion of a positive falsehood. To sanction or to permit any violation or neglect of these essential conditions, would be to encourage proceedings which might soon prove intolerable, and would expose that numerous class of persons who are but too willing to invest their money in undertakings which seem to hold out a fair prospect of reasonable

and honest profit, to the arts of projectors desirous of taking advantage of their credulity. The courts of law have, therefore, without hesitation, denounced the practice of issuing prospectuses which *are untrue, and have [384 declared the contract into which shareholders had entered in reliance upon the truth of such representations to be null and void, in case they turned out to be untrue, or delusive, or deficient in any of the conditions essential to the formation of a binding engagement; and the Companies Act, 1867, has, in express terms, enacted that any prospectus which shall omit to state the particulars of any contract entered into by the promoters before the issuing of such prospectus, shall be deemed to be fraudulent on the part of the promoters. The prospectus, which was in this case prepared by Duignan & Co., approved of by the trustees, adopted and printed, advertised and circulated by Grant, on his own behalf and on behalf of Richardson and Carlton, was the direct means by which subscribers for shares in the company were procured. Can it be doubted that the persons who were engaged in this common action for their common purpose did thereby, and by force of the representations which the prospectus contained, invite the persons to whom it was addressed to trust to its statements? Its very end and object was that it should be trusted; it solicited the confidence of the shareholders; the shareholders did trust it, and they now discover that the authors of the prospectus were each of them engaged in a transaction by which the funds of the company were to be applied to a purpose not disclosed by the prospectus, and which each of its authors had a direct interest in concealing from those to whom it was most material that they should know the whole truth respecting the engagement they were invited to undertake. Many authorities have been referred to as bearing upon the questions to be decided. It has been expressly decided that an agent cannot bargain for any benefit derived from the subject on which he is employed without disclosing the fact to his principal. That Mr. Carlton, Mr. Grant, and Messrs. Richardson, were the agents of the vendors to procure the formation of the company by which the purchase was to be made, I think must be inferred from the correspondence and other evidence, notwithstanding the form of the written contracts; but that they were the agents, self-appointed, but none the less the agents of and for the intended company, appears to be clear, for everything they did was not for themselves personally—they had no intention of buying for *themselves—but they engaged that other persons [385

should buy; and when by means of the prospectus they had accomplished this intention, they procured the company for which they had been so acting to adopt and confirm the bargain they had made, without disclosing to them the terms upon which it had been made. The law I take to be clear, that under such circumstances an agent, whatever may be the nature of his employment, or under whatever circumstances, is bound, if he has any interest in the matter, not only to declare that fact, but to specify the nature of his interest; and that all persons who act with him, and who share in that interest, are jointly and severally bound to make good, when their interest is discovered, to the principals, the whole benefit which has been obtained without the sanction of the principals: *Imperial Mercantile Credit Association v. Coleman* (*). The fact that there were two agreements, one of which was published, while the other was not, as it was intended that it should not be disclosed, may be accounted for by the mistaken notion of law which seems to have been entertained, and which is not even now relinquished by the parties engaged. But it is, nevertheless, wholly inexcusable, and justifies me in adopting the words of the judgment of the Privy Council in *Lindsay Petroleum Company v. Hurd* (*), which is thus expressed: "It is difficult to conceive anything more clearly fraudulent than for the owners of property to arm a person whom they knew to be about to endeavor to find others to take up a purchase, whether as a company or otherwise, with a document purporting to be an offer made by themselves, as owners, to sell at a fictitious price, at which price he is to propose to other people to take up and to accept that offer as if it were the real one. If that be not the real price which the owners of the property expect to get, and if they are parties to an arrangement that the intermediate agent, who is to induce others to accept the offer, is himself to put a considerable part of the nominal price into his own pocket, without any communication of the facts, the document is a dishonest and false document upon the face of it, representing no real transaction, but evidently representing a false transaction only in order to deceive somebody." It is not necessary to multiply references to decided cases, many of 386] which were referred *to in argument, but in one of the most recent decisions, *New Sombrero Phosphate Company v. Erlanger* (*), I find his Lordship, the Master of the

(*) Law Rep., 6 H. L., 189; 6 Eng. 199. (**) Law Rep., 5 P. C., 243; 8 Eng. R., R., 18.

(*) 5 Ch. D., 73; 21 Eng. R., 798.

Rolls, holding (') that the prospectus was the act of the promoters—"that promoters stand in a fiduciary relation to that company which is their creature"—and declaring that persons in "a fiduciary position must make a full and fair disclosure when they are about to sell property to those towards whom they stand in that relation." I find, moreover, that another of the learned judges by whom that case was decided (James, L.J.), says ('): "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward, or agent." But if the case were not supported by authority, I should not hesitate to say that the persons by whom this representation was made did, by making it—by inviting and soliciting the confidence of the persons to whom it was addressed—contract fiduciary relations with those persons; that by reason of those relations they were, in all justice, bound to disclose the fact that each of them had bargained to retain for themselves a large proportion of the moneys to be subscribed; that Messrs. Duignan & Co. were to be paid £1,500 for the share they had taken in promoting the company, whether or not that was to be paid by Mr. Richard Bagnall or out of the funds of that company; that Mr. Grant, and Messrs. Richardson, and Mr. Carlton, were to take between them £85,000 out of the money subscribed; and that out of the same money the Messrs. Nayler were each to have a debenture of the company for £500.

One of the numerous grounds on which the defendants rely, and which may be said to be common to all of them, was that the vendors were at liberty to employ such agents as they thought fit to effect the sale, and to agree for and pay them such *remuneration for their services by [387 way of commission as they might determine; and that this was a matter which concerned only the vendors and their agents, and that none of them were in any sense blamable for not having disclosed the terms of a bargain which concerned only themselves; and it was upon this ground that the two separate agreements were justified, and that Mr. Duignan relied, when he expressed the opinion that neither

(') 5 Ch. D., 112; 21 Eng. R., 832.

(*) 5 Ch. D., 118; 21 Eng. R., 837.

the 38th section of the statute of 1867, nor any other rule of law, required that what has been called the secret agreement ought of necessity or in propriety to have been disclosed. But although this may have a certain air of plausibility, and it might be true if the vendors and their agents were the only persons concerned in the transactions, it is wholly fallacious when applied to the facts of this case. It wholly omits the consideration that the employment of the agent was for the purpose of forming a company, and of inducing other persons to subscribe in reliance upon a representation which was untrue; for it was not true that the purchase-money to the vendors was the sum mentioned in the prospectus, but it was the purchase-money stated in the ostensible agreement, minus the amount to be paid by the vendors to their agents as a reward for procuring the subscription; and the nominal purchase-money so diminished was the true sum which was to go into the pocket of the vendors. It is upon this erroneous view of the duty of the promoters that the several defendants rely. Mr. Carlton insists upon it, and contends that the sum he bargained for was no more than a fair compensation for the risk he ran in engaging to deposit £20,000 as a guarantee that the shares required for the formation of the company should be taken by subscribers, and that his subsequent transactions with Mr. Grant concerned themselves alone, and that by means of such transactions he had justly acquired the sum stipulated between them; and having transferred the formation of the company to Mr. Grant, by whom the further proceedings were carried on, he, Carlton, had nothing further to do with the matter. Mr. Grant, who, by his answer and by means of his evidence, states with the utmost frankness the part which he and the persons connected with him took in the formation of the company, does not dispute any of the 388] matters of fact alleged by the plaintiffs, *but insists that he was justly entitled to acquire the amount for which he stipulated, and which he received, as a compensation for his risk and exertions, and says he would not undertake a similar affair but upon much more advantageous terms. Mr. Charles Richardson, who has survived his father and partner, adopts a similar line of defence. He was personally cognizant of, and an actor in, the proceedings connected with the agreement and the formation of the company, and was named in the prospectus as secretary; he prepared and circulated the letter of invitation to subscribers which accompanied the prospectus, and he continued to fill the office of secretary up to some time in the month of July, 1873; and £10,000,

part of the purchase-money, was received and retained by his partner on their joint behalf, and by reason of their having acted as promoters, and without the knowledge of the company. Mr. Joseph Nayler, and the representative of the late William Sutton Nayler, deny that they had any share in the promotion of the company—a point of which I have disposed—and allege that the two debentures of the company which were received by them from Grant were so received as a compensation for the reduction which had been made by the directors in the amount of the salaries they were to receive as managers, and not in consideration of their becoming directors of the company. In point of fact, they had previously insisted upon the payment to them by Richard Bagnall, on the completion of the purchase, of two sums of £6,000, and an annuity of £500 each for a term, as the condition of their signing the agreement of the 6th of March, 1873; and upon its being proposed that they should become managing directors of the company, they declined to do so unless the agreement with Richard Bagnall was confirmed by him, and unless they received the two debentures. Their demands were complied with, and Richard Bagnall confirmed the agreement; Mr. John Richardson obtained from Mr. Grant the two debentures, which were handed to them, and they consented to become, and became, the managing directors of the company. It has been argued on the part of the representative of William Sutton Nayler, that the plaintiffs can have no relief against him in respect of this transaction, for that if they had any claim against him, which is denied by his representative, it was a personal demand only; and *he having died [389 the cause of action died with him. I am, however, of opinion that this ground of defence fails, inasmuch as the plaintiffs claim in respect of a breach of trust, and that being established, his estate remains as liable as he would be if he were still alive; as, in fact, was decided in the *New Sombrero Phosphate Company v. Erlanger* (¹), in respect of the representatives of one of the original actors in the matter; and these two debentures, the property of the company, having been obtained by the Messrs. Nayler as the price of their becoming directors, Joseph Nayler cannot retain that which he has received, and the estate of William Sutton Nayler is liable to restore that which was received by him. The plaintiffs have insisted that they are entitled to charge the two Naylers with all such sums as may have been received by them under their agreement with Messrs. Bagnall, which

(¹) 5 Ch. D., 78; 21 Eng. R., 798.

agreement is said to be a subject of litigation between the parties. The Messrs. Nayler allege that this agreement was not connected with the purchase (except that it was to take effect on the completion of the purchase), and that it constituted a merely personal engagement on the part of the Bagnalls, and was to be satisfied by Richard Bagnall out of his own moneys. Upon such evidence as is before me, I cannot see that the plaintiffs' contention in this respect is established, or that the defendants, Messrs. Nayler, are chargeable with more than the two sums of £500 received by them from Mr. Grant.

With respect to the £1,500 which was obtained by Messrs. Duignan & Co. from Richard Bagnall, and the refunding of which is claimed by the company, it appears to me that this claim cannot be sustained, because that sum never formed any part of the funds of the company, but was paid, as it is said, by Richard Bagnall, in respect of the personal liability which he had contracted with Mr. Duignan and out of his own pocket. That it was promised and was paid in remuneration of the services of the firm in promoting the company, is, I think, established; that the same firm did perform such services is clear; that they did engage with Mr. Carlton, in consideration of another sum of 500 guineas, to investigate on behalf of the company the title of the vendors, is clear; and that with their full knowledge and assent 390] they were *advertised and acted as the solicitors of the company is clear. It is equally clear that under these circumstances they wholly failed to communicate to the company, they had undertaken to serve, the nature of the secret agreement, although in a letter of Mr. Duignan to John Richardson, speaking of the drafts he had then "sketched," he wrote, "the drafts are framed, having special regard to all the circumstances, and that they will have to be referred to in the prospectus." The fact from which this conclusion is drawn is not disputed by them, but they assert that it was not necessary that they should make the disclosure. I cannot, however, hesitate to say that they appear to me to have mistaken their legal obligation to their clients, and that, being the hired and paid promoters of the company, and being and acting as the solicitors of the company before and after it was formed, they have failed in the discharge of the duty which was involved in their relation to the company, and that they and the other defendants have combined in common action, and for a common purpose, to induce the company to believe that they were purchasing from the vendors at the price mentioned in the

contract, when, in fact, that price was less by the amount which was received by the other promoters.

On the whole, I have come to the conclusion that the sum of £85,000, which has been so received, cannot be retained by the persons by whom it was received, but that the defendants Carlton and Grant must be declared to be jointly and severally liable to pay to the plaintiffs the same £85,000, with interest at 4 per cent. per annum from the 26th of April, 1873; and that it must be further declared that the defendant Charles Fletcher Richardson is also liable to pay to the plaintiffs the sum of £10,000, part of the said sum of £85,000, with interest from the same day at 4 per cent. per annum until payment; and that the defendant Joseph Nayler is also liable to pay to the plaintiffs the sum of £500, part of the said sum of £85,000, with interest at the like rate from the 9th of July, 1873, until payment; and that the defendants Edward Nayler and Joseph Nayler, as legal personal representatives of William Sutton Nayler, deceased, are also liable to pay to the plaintiffs the sum of £500, part of the said sum of £85,000, with interest at the like rate from the 9th of July until payment. If the last named defendants do not admit assets, the usual *administration ac- [391] counts must be taken of their testator's estate. The decree will direct payment of those several amounts within a time to be fixed, and it will also declare that the liability of the several defendants to pay any portion of the sums for which they are respectively declared to be liable may be discharged by such defendants transferring to the plaintiffs debentures of the plaintiff company, which have been received by the defendants under the conditions in the bill mentioned, and by accounting to the plaintiffs for the interest which may have been received by the defendants on such debentures. It has been suggested in the course of the arguments by some of the defendants, but not put forward in any of the pleadings, that even if the judgment of the court should be adverse to them, they are entitled to have allowed to them a fair commission for their respective services in and about the establishment of the company, and this the more especially because the plaintiffs offer by their bill to allow such sum in that respect as the court shall think reasonable. The plaintiffs, however, now that the cause has been fully heard, desire to withdraw that offer, and insist that they are not bound by it, since the defendants, by their answers, and by the defences they have set up, deny the plaintiffs' title to any relief; and the plaintiffs further insist that the court cannot in reason and justice make any allowance for

such commission. I am of opinion that I cannot entertain this suggestion of the defendants. I can resort to no means of ascertaining what would be a fair commission. The defendants suggest that the whole amount which has been retained by them is not more than a fair commission for their services. I know of no standard or tariff by which such commission could be ascertained, and no evidence has been adduced on the subject of any allowance. But, besides this, I am of opinion that a commission to be allowed must be founded upon some species of contract, of which there is no trace in the case before me; and, moreover, it would neither be just nor reasonable that a commission should be paid by the company to persons who have signally failed in the discharge of duties which, as promoters, they ought to have fulfilled. It remains only to dispose of the costs up to the hearing; and as to them I think the defendants, except the defendant Bytheway (who is merely a 392] nominal party who has *not appeared, and against whom no relief is asked, and except the defendants Bagnall who have already compromised), having been engaged together as promoters are jointly and severally liable to pay those costs to the plaintiffs.

From this decision the defendants Grant, Carlton, Duignan, Lewis, and Richardson appealed. The appeal came on for hearing on the 3d of August.

Sir H. Jackson, Q.C., and *Everitt*, for the defendant Grant: In the present case several of the elements are absent which induced the court to give relief in other cases. There is no question as to the application of the 38th section of the Companies Act, 1867. There is no proof of any fraud or misrepresentation on the part of the defendants, and all such charges have been now abandoned by the plaintiffs. The statements in the prospectus were perfectly true; the valuation of the property was fairly made; nor was there rigging of the market or any unfair practice in order to induce the public to take the shares. The only ground on which the plaintiffs base their claim to relief is that there was a fiduciary relation between the defendants and the company. But so far as the defendant Grant was concerned it is difficult to understand how any such relation could exist between him and persons who had never trusted him. He had never made any representation to them. His connection with Carlton was merely a private arrangement with him, and had no influence upon those who joined the company, for they knew nothing about it. He was the agent of the vendors, and not of the company. The company was not

formed at the time when his services were engaged, therefore he could stand in no fiduciary relation towards it. But if it had been formed he would have owed no duty to it. There is nothing fraudulent in a man who goes to a company and tells them that he can get them property at a certain price, and sells it to them at that price, concealing from them that he is getting a profit from the sale. The plaintiffs assert that Grant was a promoter of the company, and they rely upon *New Sombrero Phosphate Company v. Erlanger* (*) as establishing that every *promoter of a company [393 stands in a fiduciary relation to the company, and can make no profit by his services. But, in the first place, Grant was not a promoter at all. He had nothing to do with the company till it was established. But admitting that he was a promoter in some sense, there is a distinction between what may be called an internal promoter and an external promoter, who is merely paid for his services like an engineer or a solicitor. In the case of *New Sombrero Phosphate Company v. Erlanger* (*) the defendants were admitted to be internal promoters; the directors were nominated by them. Grant was not in such a position. He was the agent of the vendors on a *del credere* commission. If it had not been for the large amount paid to him, nothing would have been heard of the case. But the money was well earned, for the risk and responsibility he undertook were enormous. It would be carrying the doctrine laid down in the case cited to an absurdity to say that all persons who in any way contributed to the formation of a company were in a fiduciary relation to it. In the *Lindsay Petroleum Company v. Hurd* (*) also the fiduciary relation of the defendants towards the company was admitted.

[COTTON, L.J.: Is it not immaterial whether Grant was a promoter or not? The real question seems to be whether the company was not entitled to have the benefit of the real instead of the nominal contract.]

The contract with Bytheway was the real contract. What is called the secret contract had nothing to do with the company. It was an agreement between the vendors and their own agent.

We also contend that the plaintiffs have put themselves out of court by compromising the suit with the vendors, and giving up their claim to rescind the contract. They cannot confirm the contract and also recover against Grant on the ground that the contract was fraudulent. At all events, the sum of £31,000 which the plaintiffs have received from

(*) 5 Ch. D., 73; 21 Eng. R., 798. (*) Law Rep., 5 P. C., 221; 8 Eng. R., 180.

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the vendors must be deducted from any sum which Grant is liable to pay to them. Otherwise they will be getting more than the worth of the property. If the cause had come to 394] a hearing before the compromise, Grant might *have offered to pay back the whole purchase-money, and so put himself in the position of the vendors. They cannot deprive him of this right.

Lastly, we complain that the Vice-Chancellor refused to allow Grant the expenses which he had incurred on behalf of the company, and a fair commission, although the plaintiffs had offered in their bill to allow them. Grant is fairly entitled to these allowances, and even if this were doubtful the plaintiffs are bound by their offer.

Swanston, Q.C., for the defendant Carlton: The defence relied on by Grant is equally applicable to Carlton. Indeed the facts proved are still more favorable to Carlton than to Grant; for he was not a professional financier, and simply acted as the vendors' agent to find them a purchaser for the property. Neither he nor Grant received any money from the company nor out of the company's funds, nor did they select any of the directors. They had no more to do with the actual getting up of the company than Bytheway had. The directors themselves admit, in their answers to the interrogatories exhibited by the defendants, that they understood that the Bagnall trustees paid all expenses and commission. They knew that some persons had a commission, although they might not know their names or the amount paid. The real question is whether a vendor may not pay an agent or broker what he pleases, and whether the agent is bound to tell the purchaser what he has received. The plaintiffs say that the public would not have joined the company if they had known that so large a bonus had been paid to the vendors' agents. What then? This is not an action by shareholders, who may have their statutory remedy under the act of 1867 if there has been any violation of the act, but an action by the company based upon fraud. There can be no fraud without some falsehood or misrepresentation, of which there is here an entire absence. The decree of the Vice-Chancellor is most unjust in refusing commission and just allowances. Both Grant and Carlton undertook a great risk. It was almost impossible to get any man to undertake such a responsibility, and yet the Vice-Chancellor has stripped them of all profit and 395] reward. It is absurd to suppose *that men will undertake work of so responsible and difficult a nature for mere philanthropy.

The defendant *W. H. Duignan*, who had leave to appeal on the question of costs, appeared in person: The Vice-Chancellor has granted no relief against my partner and myself, but has made us liable for the plaintiffs' costs. We therefore appeal from his decision, which not only inflicts a great pecuniary loss on us, but casts a slur on our professional character.

We acted entirely *bona fide*, and no complaint is made against us except that we did not disclose the secret contract of the 6th of March. But that contract was not a contract binding or affecting the company, and was not therefore within the 38th section of the act of 1867; and whatever may now be the result of the authorities, no one at the time had any notion that there was anything fraudulent in not disclosing the private arrangements between the vendors and their agents, or that the vendors' agents had any fiduciary relation towards the intended company. We acted as the vendors' solicitors exclusively till after the company was formed. We drew a skeleton prospectus, and revised the prospectus, on behalf of the vendors and Naylor, not of the company. We investigated the title on behalf of the promoters of the company under a special arrangement; but we had no idea at that time of acting generally as the solicitors of the company. When appointed solicitors for the company it was not our duty to disclose the affairs of our former clients. Whether as solicitors for the vendors or for the company, we performed our duty to the best of our power, and no action will lie against solicitors unless for gross ignorance or negligence. It is an abuse of the process of the court to make solicitors parties for the purpose of making them pay costs: *Purves v. Landell* (1); *Morgan v. Elford* (2); *Barnes v. Addy* (3). The money which we received, namely, £1,500 from R. Bagnall and £525 from the company, was fairly earned by us and ought not to be refunded: *In re Hereford and South Wales Wagon Co.* (4); *Albion Steel and Wire Company v. Martin* (5). With respect to our conduct before the formation of the company, the plaintiffs have in fact waived all claims against us by compromising the suit with the vendors, and abandoning their claim to rescind the contract. For if the contract is upheld we are free from blame for negotiating it. And when the compromise was agreed

(1) 12 Cl. & F., 91.

(4) 2 Ch. D., 621; 17 Eng. Rep.,

(2) 4 Ch. D., 332.

644.

(3) Law Rep., 9 Ch., 244; 8 Eng. R.,

(5) 1 Ch. D., 580.

upon, we ought to have been dismissed at once, and we were willing to consent to be dismissed without costs; but the plaintiffs wished to bind us to assist them in the suit against our co-defendants, a thing which we could not honorably do. As to our conduct as the solicitors of the company, the plaintiffs themselves show that they had no great cause of complaint against us, for they continued us as their solicitors for some time after the institution of the suit.

The defendant *Lewis*, in person, supported the same views.

The defendant *C. F. Richardson* also appeared in person: The business was managed by my father, and he received the £10,000. I had very little part in it, and only acted as secretary for a short time until a permanent secretary could be appointed. Our firm simply acted as brokers for the vendors. We were not promoters in any sense; and the directors knew that we were simply brokers, and that we were paid for our services. It never occurred to us that it was our duty to disclose to the directors the agreement between the vendors and Carlton.

JAMES, L.J.: We feel no doubt that the defendants Grant and Carlton are liable to repay the profits which they made by this transaction. But we desire to hear the counsel for the respondents on the following points:

1. Whether credit ought not to be given to the defendants for the sum paid to the plaintiffs by the vendors under the compromise of February, 1876, in satisfaction of the plaintiffs' claim to rescind the contract.

2. Whether credit ought not to be given to the defendants for the costs, charges and expenses incurred in bringing out the company, and for a fair commission.

3. Whether the defendants Duignan & Lewis ought to be 397] made *liable for the costs of the suit, and whether they ought not to have costs.

4. Whether the defendant *C. F. Richardson* ought to be made liable at all.

Kay, Q.C., and *Davey*, Q.C. (*Russell Roberts* with them): With respect to the defendant *Richardson*, it appears from the evidence that the £10,000 paid to his father went into the partnership assets.

[They were stopped upon this point.]

Secondly, with respect to *Duignan & Lewis*. They were cognizant of the negotiations which led to the secret agreement from their commencement, and assisted in the preparation and carrying out of the agreement. They also assisted in the preparation of the prospectus of the company, and

knew that they were to be the solicitors of the new company. The investigation of the title to the property was also intrusted to them. If, therefore, the secret agreement was a fraud upon the company they were participators in it. When they were made solicitors to the company they ought to have disclosed the secret agreement to the directors. If such a course would have been inconsistent with their duty to their old clients, it was their own fault for accepting two inconsistent duties. A solicitor who has assisted in concocting a fraud upon a third party cannot escape the consequences of his complicity by afterwards becoming the solicitor of such third party. They were promoters of the company like the other defendants, and were in a fiduciary relation to the company when it was established; and although we do not ask them to repay the money which they received for their services, we say that they ought to pay the costs of the suit: *Dunne v. English* (*); *New Sombrero Phosphate Company v. Erlanger* (*); *Phosphate Sewage Company v. Hartmont* (*); *Lelexier v. Margravine of Anspach* (*); *Baker v. Loader* (*).

As to the third point, namely, the right of Carlton and Grant to their expenses and a fair commission, there were no expenses *incurred by Carlton, because he was [398 indemnified by Grant, and we deny that the expenses claimed by Grant were legitimately incurred. They principally consisted of advertisements and circulars puffing the company, and these were put forth for his own profit. Nor has he any equitable claim to a commission. A commission can only be based upon a contract, and there was none in this case. He undertook the task of floating the company entirely at his own risk. Nor is there any mode of assessing the amount of what would be a fair commission. It is true that we offered to allow him his expenses and a fair commission in the bill; but that was to induce him to submit to our claim, and in ignorance of many of the facts of the case, but as he has set us at defiance, and as we have now ascertained that the transaction amounted to a fraud on the company, we have a right to withdraw our offer: *Knight v. Bowyer* (*).

The last point is the effect of the compromise with the vendors. The action was brought for a double purpose, to obtain a rescission of the contract as against the vendors if

(¹) Law Rep., 18 Eq., 524; 10 Eng. R., 887.

(²) 5 Ch. D., 73; 21 Eng. R., 798.

(³) 5 Ch. D., 394; 22 Eng. R., 157.

(⁴) 15 Ves., 164.

(⁵) Law Rep., 16 Eq., 49; 6 Eng. Rep., 634.

(⁶) 2 De G. & J., 421.

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we should elect to do so, and also to recover from the promoters of the company the profit that they had fraudulently made by means of it. We had a right to give up our right to rescind the contract without prejudicing our claim against the promoters. The money paid by the vendors on the occasion of the compromise was the price paid by them to induce us to elect not to rescind the contract. It had nothing to do with the relief claimed against the other defendants, who are not affected in any way by the compromise.

Sir H. Jackson, in reply for the defendant Grant.

Swanston, in reply for the defendant Carlton.

W. H. Duignan, in reply for himself and his partner.

August 8. JAMES, L.J.: Upon the main point in this case we did not think it necessary to call for any answer 399] from the respondents. These cases have *been so often before the court unfortunately of late years, and I have had occasion myself so often to express my views upon them, that I do not think it necessary to say any more upon this occasion upon the point than that I adhere to what was said in *Parker v. McKenna* (¹), and to what was said in *New Sombrero Company v. Erlanger* (²). I adopt what was said by Lord Selborne in *Lindsay Petroleum Company v. Hurd* (³), and I think it unnecessary to say any more than that it appears to me according to what was said in those cases, and according to the established principles of the Court of Chancery, that the decree was a mere matter of course as against the principal defendants.

However there are some minor points on which we heard the counsel for the plaintiffs and had the matter fully discussed before us, and especially as to the defendants Carlton and Grant, whether they were entitled to any deduction out of the amount which has been found against them and declared to be due from them by the decree of the Vice-Chancellor.

One point which was very strongly argued before us was that the defendants Carlton and Grant were entitled to a deduction in respect of the sum which was received upon the compromise with the vendors, but I am of opinion that they are not entitled to any such deduction.

The case against the vendors was, in truth, a totally dis-

(¹) Law Rep., 10 Ch., 96; 11 Eng. R., 456. (²) Law Rep., 5 P. C., 221; 8 Eng. R., 180.

(³) 5 Ch. D., 73; 21 Eng. R., 798.

inct and separate case from that against the other defendants. The case against the vendors was that the plaintiffs were by reason of what had taken place entitled to an absolute rescission of the contract, and the plaintiffs and those defendants, the vendors, agreed to put an end to that case in consideration of a sum of money paid by the vendors to them. That was the price of the company giving up that which beyond all question it seems to me they were entitled to, that is to say, the right to have the contract rescinded and to have the whole purchase-money repaid to them. With that price so paid for the compromise, it appears to me the other defendants have really nothing to do. They are in no degree prejudiced by it. It was said, indeed, that if the case had gone to a hearing the defendants might have offered themselves to have *taken the property and [400 paid the whole of the purchase-money, and thus have put themselves in the position to realize the property. If they had that right at the hearing, and if they had been so minded, there was nothing in that compromise which would have prevented their obtaining whatever benefit such a course of proceeding might have given them. I am therefore of opinion that we cannot take into consideration at all that which was entirely a matter between the vendors and the company.

But there was a second point, which was with regard to the costs, charges, and expenses incurred by the defendants, and also with regard to the allowance of a sum by way of commission. That divides itself into two branches, the costs, charges, and expenses, and the commission. Now the costs, charges, and expenses, I think they had a right, independently of the offer in the bill, to deduct, because what they were liable to pay the company was the profits which they had made in a fiduciary character, that is to say, the net profits which they had made, and I think that costs, charges, and expenses might properly be deducted in ascertaining the net profits, and to that extent, therefore, they were, I think, entitled, independently of the offer in the bill.

The commission stands entirely upon a different footing. The commission they clearly were not entitled to in any way whatever, except by reason of the offer which was made in the bill. The offer was reasonable and proper, and I may say a liberal offer on the part of the company, which they were minded to make, and notwithstanding the case of *Knight v. Bowyer* (¹), before the Lords Justices Knight

(¹) 2 De G. & J., 421.

Bruce and Turner, to which we have been referred, we do not think this is a case in which it is reasonable that they should resile from the offer which they have so deliberately made. But that offer is one which of course is to be considered according to the true meaning of the company in making it, and we cannot deal with it as one which is to lead to further litigation, to further inquiry, to a new lawsuit between the company and the defendants as to what would be reasonable compensation to be ascertained by a jury, or by the court, or by the judge in chambers, or by a 401] referee, but we must take the *offer according to the true spirit of it, and it was an offer to pay what the court thought to be a fair amount of commission, and we must deal with that in the best way we can. I shall mention before the end of what I have to say the mode in which we propose to deal with these two things respectively, the costs, charges, and expenses, and the commission.

Then there was the other point, which is the point in which the defendants Messrs. Duignan & Lewis are interested as to the decree against them to pay the costs of the suit. Now, in considering what is right to be done with regard to that question, it is necessary, I think, to bear in mind this, that the case of the company is, in fact, a double case; it is a double suit which might have been made the subject of two totally different suits, if the plaintiffs had been so minded. The one was against the vendors for rescission of the contract. To that suit the solicitor might, according to the practice of the court, have been a proper—not a necessary, but a proper party—because he was an active or concurring party in the matters which gave the right to rescind. If that had been the sole suit, if he had been retained as a party merely for the purpose of rescission, probably the decree might have been right in making him pay the costs, though I am not prepared to extend or to encourage the practice of making a solicitor party to a suit when there are real parties before the court to answer for what they have done.

But then there was the other part of the suit, and the other part of the suit was really, in my judgment, an action for money had and received to the use of the company. It was money received by persons—profits made by persons in a fiduciary character, of which profits they are trustees for the company. To that part of the suit the solicitor *quâ* solicitor was certainly not a necessary or proper party.

Now, with regard to the first part of the suit, that which

relates to rescission, I am bound to say that I think charges have been made against Mr. Duignan considerably beyond what ought to have been made—considerably; but I think that Mr. Duignan was, to say the least of it, very indiscreet. I am not prepared to say much more than that I think he ought not to have been party to the preparation of the secret and ostensible agreements which *might have been [402 made the means of deception and fraud; he was arming some person with that which might have been made the means of fraud. Then he ought not, being the solicitor to the vendors, and having been a solicitor concurring in the transaction, such as it was, to have placed himself in the position of solicitor to the company, the purchasers, while the purchase was still incomplete, and while the company was still really not bound to anything until they had put their seals to the instrument by which they adopted the agreement made with Mr. Carlton. He was indiscreet in putting himself in that position of solicitor in which, perhaps, it was his duty—a conflicting duty—to communicate what he knew; therefore I cannot acquit him of impropriety and indiscretion in that respect.

But then we have to consider this, that the suit for rescission was entirely compromised. The suit for rescission was compromised with the vendors, and thereupon that part of the suit in which Messrs. Duignan & Lewis were made parties, *quâ* solicitor, was compromised with the principals and came to an end. Thereupon the suit ought to have been, as it appears to me, dismissed *simpliciter* without costs against each of those gentlemen—I mean in that character so far as they were parties to the first part. That was not done. The suit was continued after that compromise was made, after that which was mentioned in one of the letters of the company's solicitors themselves, after they had obtained the material object of the suit for which they had made them parties—after that they were still continued parties to the suit, and they were continued parties to the suit in respect of a personal demand as against them, to repay the sum of £1,500 alleged to have been received by them out of the moneys of the company. That is a part of the suit which has entirely failed. The Vice-Chancellor was satisfied, and we are satisfied, that there never was any pretence for saying that that £1,500 was money of the company which the company were entitled to regain from them; therefore the suit was proceeded with for the purpose of recovering from them something which they were not liable to pay, and which the company was not entitled to receive. Therefore

I am of opinion, and my colleagues concur with me in this, that the reasonable and fair thing to do with respect to the 403] costs of Messrs. Duignan & Lewis *is that they are to have no costs up to the time at which the compromise was made with the vendors, but that from the time of that compromise up to and including the present appeals, they are entitled to have their costs of the suit.

That, I think, disposes of that part of the case, and then the mode in which we propose to deal with the question of the set-off or the demand for costs, charges, and expenses, and the commission, is to add to the decree these words—the exact words will be given to the Registrar, but this will be the substance of them—It appearing from the evidence that costs, charges, and expenses were incurred in and about the formation of the company (putting in the proper words there), to the amount of £6,250 or thereabouts, declare that the defendants Grant and Carlton may retain out of the sums ordered to be paid by them such sum, but at the request either of the plaintiffs or the said last named defendants, let an inquiry be made in chambers as to the actual amount of such costs, charges, and expenses, and let it be certified whether such actual amount is more or less than such sum, and the excess or deficiency, as the case may be, is to be paid by the company to such defendants, or by such defendants to the company; and the company having by their bill offered to pay a fair commission, this court doth think fit by reason of such offer (that really is the only ground on which we do it) to assess such reasonable commission at £9,000 to the defendants Grant, Carlton, and Richardson. We say to Grant, Carlton, and Richardson, because they must receive that jointly, and they must apportion it between themselves. We have no means of doing that, or ascertaining how that sum is to be divided. They are all three persons who earned that commission, and they all three are entitled to it.

BAGGALLAY, L.J.: I am of the same opinion, and I have very little to add. The cases to which the Lord Justice has referred establish no new principle; they recognize an old principle, but they apply it to new states of circumstances. It appears to me that, having regard to the principle so established and so recognized, it is impossible to deal with the facts of this case, as they are admitted even by the answers of the defendants Grant, Carlton, and Richardson, 404] *without coming to the conclusion that those three gentlemen stood in a fiduciary relation to the intended

company, and that as such they cannot make profit out of the transaction.

As regards the deductions to be made from the amount ordered to be paid by the decree of the Vice-Chancellor, I was for some time pressed with the notion that the amount received by the company upon the compromise with the vendors ought to be deducted from the amount so ordered to be paid by them, but a further consideration of the case has satisfied me that that is not so. If prior to the institution of this suit a dispute had arisen between the company and Messrs. Bagnall with reference to a suggested rescission of the contract, it would have been perfectly competent for Messrs. Bagnall and the company to have come to any arrangement they might think fit with the view of putting an end to any such litigation, and after any payment had been made by the Messrs. Bagnall to the company for the purpose of leading to such an arrangement, it would have been quite open to the company then to have proceeded against their agents, Grant, Carlton, and Richardson, for the purpose of recovering from them the amount of profit which they made out of the transaction. It does not appear to me that the circumstance that the two forms of relief were combined in the one suit, and that relief was asked in an alternative form, can make any difference.

Then as regards the commission and the expenses, I have nothing to add to what has already been said by the Lord Justice.

With regard to the position of the defendants Duignan & Co., I am bound to say that in my opinion there is no ground whatever for charging them with any *mala fides* in any part of the transaction. I think that in the matters to which the Lord Justice has referred there was an indiscretion, an indiscretion which at the present day they would not think of committing, but an indiscretion which at that time perhaps, in the not very generally recognized application of principles to existing circumstances, they did not appreciate to the same extent as they would now. I think also there is this further circumstance, that it was desired by all parties that they should do that which I think was an indiscreet thing, namely, become the solicitors of the company; those who managed the company evidently thought that it would be a *very great advantage to [405 the company that these gentlemen, who had the entire confidence of Mr. Bagnall and afterwards of his trustees, should be in the position of solicitors to the company; and this is borne out by the fact that, notwithstanding the discovery of

all these transactions, the company have thought it right and for their interest to continue Messrs. Duignan & Co. as their solicitors, though they were prosecuting a hostile suit against them.

COTTON, L.J.: I am of the same opinion, and as this is the first time a case of this sort has come before me, I should like to express my reasons for holding that on the main point the decree of the Vice-Chancellor was correct.

The plaintiffs were a company formed, as stated in their memorandum, to carry into effect an agreement of the 6th of March, 1873. That agreement was an agreement made between Bagnall and others and Bytheway, Bytheway being described as a trustee for and on behalf of an intended joint stock company about to be formed, and by that agreement "the vendors agreed to sell to Bytheway on behalf of the company, and the said G. Bytheway, on behalf of the company, agreed to purchase, on the terms hereinafter mentioned, the good-will and business of John Bagnall & Sons." The price mentioned in that agreement, to which Bagnall's trustees and Bytheway were the only parties, was £290,370, and that was the agreement referred to both in the memorandum and articles and in the prospectus. Bytheway himself, as has been said, was a mere name; that is to say, it is admitted that he was acting on behalf of Carlton and Grant, and, therefore, if he is under this agreement a trustee, Carlton and Grant, putting him forward simply to represent them, must stand in the same position in which Bytheway would have done under that agreement. Now that agreement was not the only one. On the same day an agreement of even date was made between Carlton of the one part, representing himself and Grant (that being shown clearly by a contemporaneous agreement executed between them), and Bagnall's trustees, the vendors of the other part, under which, out of the purchase-money payable by Bytheway, 406] or by the company *when formed, a sum of £85,000 was to be received by Carlton. Of that £60,000 was ostensibly for commission and expenses for the purpose of forming the company, and for the risk which Carlton undertook by the guarantee which he gave, and £25,000 was openly and ostensibly on the face of this "secret agreement" (as it may be called)—a sum deducted from the purchase-money in consequence of the time of its completion having been delayed—to be paid to Carlton for his own benefit, and not for the benefit of those who were called in the correspondence the ultimate purchasers, as undoubtedly that £25,000 ought to have been deducted for their benefit. Now

that sum of £25,000, if Carlton was a trustee, could not possibly be retained by him; for I take it to be one of the clearest principles of equity that a trustee cannot, by any possibility, at the expense of his *cestui que trust*, make in secret and without his full approval a profit in the transaction in which he is a trustee. The £80,000, if it had really been all exhausted in expenses, if that was a possibility, might stand in a different position; but as far as it was profit, and the court proposes to allow out of that £80,000 the expenses incurred in forming the company, that would stand exactly in the same position as the £25,000.

The only question seems really to be whether or no Carlton and Grant are, in respect of this contract, to be considered as trustees for the company afterwards formed. If they are, I can hardly conceive that it is open to argument that they must not account for all profit secretly made by them in the transaction.

It is said that at this time there was no company, and that, therefore, they could not be trustees for a company which did not exist; but there is a fallacy in that. At the time there was no company, and if before Carlton and Grant had proposed to the public to form a company—I will not say to join them, because Carlton and Grant did not join the company—to take over this contract, they had been minded to say to Bagnall, We will not insist on our contract, they might have given up the contract; or if they, without having disclosed the matter to the public and asked them to form a company to take this contract, had said, We will keep it to ourselves, they might have done so. But matters did not stop as they were on the 6th of March, 1873, *when the matter had not been brought before the [407 public. Grant (and Carlton must be answerable for his acts) does issue a prospectus asking the public to form a company for the purpose of taking this contract of the 6th of March, 1873, and that company is, as appears by its memorandum, expressly formed for the purpose of taking this contract. Now, can either Carlton or Grant, by possibility, say that the company is not a *cestui que trust* under that agreement of the 6th of March? The agreement was entered into by Bytheway, described as a trustee for and on behalf of the intended company. He bought the business on behalf of the company, and when the company was formed, and Bytheway, or Carlton and Grant behind him, offer the contract which had been so entered into to the company so formed, it is impossible to say that the company was not the *cestui que trust*, and when the company

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was so formed, and the benefit of the contract offered to it, those who had by this contract secured the business could not, in my opinion, retain any secret profit out of the price payable under the contract. They became in this respect in the same position as if the company had existed at the time of the contract.

That being so, the principle of equity clearly applies. Carlton and Grant are trustees for the company. They cannot, by any possibility, secretly make to themselves a profit in the transaction in which they were trustees; and I put it in that way rather than say anything about promoters being in a fiduciary position; because, although I quite concur in that, it is open to this observation, that they are not trustees as regards all matters nor at all times, but when once persons, who have got a contract for a company intended to be formed, do put forward to the public an option to join in the company, and to take the purchase, then from the very time when the contract is entered into they make themselves trustees for the company, and are, as regards obtaining any secret profit to themselves, in the same position as if the company was existing at the time when the contract was entered into.

There is another principle which we may consider as involved in this case: How can a trustee possibly justify saying to his *cestui que trust*, I bought this property for you, I bought it for £300,000, when in fact there was a secret agreement for the benefit and profit of the trustee, 408] that out of the £300,000, a sum of £85,000, *or any other sum—it does not depend on the amount—should go into his pocket as a benefit and profit to himself? It was urged, why should not the vendor pay his agent? and there was a sum paid to these gentlemen for services to be rendered to the vendor. I said during the argument, and I repeat it, that a vendor may pay his agent—nobody doubts it—but supposing that agent occupies another position, namely, that of agent or trustee for the purchaser, can he, as against the purchaser, looking to his position of trustee or agent for him, retain that which, if he had not occupied that position, he might have received, and properly received, from the vendor? In my opinion, therefore, Carlton and Grant must be considered, when the company was formed by them for the very purpose of taking their contract, to be bound by the terms of the contract; they made it on behalf of and as trustees for the company, and they cannot retain for their own benefit any part of the price which the vendor was willing to give up in diminution of the ostensible price.

Therefore, in my opinion, Carlton and Grant are properly made answerable, not for the entire £85,000, but for the £85,000 less those expenses which the secret agreement required them to undertake in order to entitle themselves to the £60,000.

I have said nothing about Mr. John Richardson; but he was only made answerable for the £10,000 received by him. I see no possible reason for excusing Mr. C. F. Richardson from payment of that sum. He was a partner with his father; the £10,000 went into the partnership assets, and they well knew the whole of the transaction, well knew of all these agreements, and they well knew that the sum of £10,000 was to be paid to them out of the secret profit which persons standing in the position of trustees for the company were going to put into their own pockets.

Now I think I need add nothing to what has been said by the Lord Justice as regards the charges and expenses. The principle on which I decide this case is, that the trustee cannot make for himself a secret profit; and the profit is the net balance of the £85,000, after deducting any charges and expenses properly incurred in the formation of the company.

The commission has also been dealt with. I certainly should not have given any commission to any of these parties except *for the offer in the bill, because I [409 take it that nothing is clearer than that if a trustee will enter into such a transaction as this he cannot claim as of right any commission or payment for those services which, under such circumstances, he is in fact rendering to the *cestuis que trust*.

I would just say a word as regards Messrs. Duignan & Lewis. I concur in the result which has been arrived at by my colleagues; and I concur also in the opinion expressed by Lord Justice James yesterday, that no member of the firm had any intention to misstate, or to be a party to the commission of a fraud. It is difficult to see how they could (after a letter, which I referred to in the course of the argument, pointing out that any deduction from the price in respect of the alteration in the time of completion ought to go to the ultimate purchasers) have concurred in such a prospectus. They did concur in it, because they did not alter it, they knew it was issued in that form, they knew what was there stated, and they knew it referred to them as solicitors. It is difficult to see how they could have concurred in such a prospectus, referring only to the ostensible and not to the secret agreement; but I think, as is probably

very often the case, they did not look at the real nature of the transaction, but were blinded by some considerations with regard to legal questions as to whether or no that secret agreement was such a contract as under the 38th section of the act of 1867, ought to have been disclosed on the prospectus. But as they had knowledge of the secret agreement, and knowledge that the prospectus referred only to the ostensible agreement, I quite agree in saying that they committed a great mistake in allowing themselves to become the solicitors of the company. Whether or no it was their duty on becoming solicitors of the company to disclose to the board in such a way that it might be on the minutes (because that is the only way in which it could be brought to the knowledge of the board) the fact of the secret agreement, I give no opinion; but possibly, for their justification, it may be said that having regard to the person who introduced the three directors, Mr. Gem, Mr. Lloyd, and Mr. Barclay, they might reasonably suppose that the whole transaction had been communicated to them; but still, knowing what they did, it was, in my opinion, rather incautious of them to under-410] take *the duty of solicitors to the company, to undertake the duty imposed upon them by the prospectus of showing the intending shareholders the ostensible agreement of the 6th of May, 1873, when there was, as they knew, behind that, an agreement which entirely altered the purchase-money which ought to have been paid by the company. But thinking they were wrong there, I quite agree that when there was a compromise of that part of the suit to which they were made parties as having joined with the vendors in transactions which entitled the plaintiffs to rescission, that part of the suit being at an end, they ought to have been dismissed without costs *simpliciter*. But the plaintiffs have gone on, they have gone on with the other litigation to seek to recover the £1,500, on a statement that that was received out of the purchase-money. But now it is to be borne in mind that there had been before the bill an investigation by the committee; that that committee had made its report, and that that report stated correctly that Mr. Duignan alleged (and alleged correctly, as it turns out) that the £1,500 was paid not out of the purchase-money, but by one of the parties beneficially interested in the estate. That has turned out to be correct, and if the company chose to go on on the supposition that they could show that it was in fact paid out of the purchase-money, they did it entirely at their own risk, and however incautious Mr. Duignan and his firm may have been as regards other parts of the transac-

tion, and in becoming the solicitors to the company, if the company chose to go on seeking to recover that £1,500, and seeking to falsify the statements made by Mr. Duignan, which were made before the investigation committee, they must do it at their own cost and risk, and Mr. Duignan is entitled, from the time mentioned by the Lord Justice, to his costs, on the ground that those who continue such a litigation, though with a solicitor, must do it under the ordinary risk of having to pay the costs. And, as was pointed out by Lord Justice Baggallay, Mr. Duignan and his firm had the strongest answer to these observations and attacks which have been made on him, in the fact that, after the institution of the suit and until a very recent period, they were continued as the solicitors of the company. That probably would of itself be sufficient to vindicate them from the charges which have been brought *against them; but I think it [411 right, after the case has been heard, to say that I regret that there had been an attack of such a personal character, I think not deserved, against Mr. Duignan and his firm, because such attacks and such observations must embitter litigation, and must add to the expense by inducing parties, in their justification, to go into matters entirely irrelevant to those questions which the court has to decide. I entirely agree with the Lord Justice, that it is not desirable to introduce solicitors who have been acting as such in the matter into litigation merely for the purpose of charging them with costs, or for any other purpose; and in this case it is specially to be regretted that after the compromise of the suit for rescission Messrs. Duignan were still continued, in order that the company might seek to recover from them the £1,500, on grounds which the investigation committee had told them could not be supported. I therefore agree in what has been said by the Lord Justice, that as regards costs, Mr. Duignan's firm should have their costs from the time of the compromise, including the costs of the appeal. There will be no costs of the other appellants, because, in substance, the decree has been affirmed.

Davey stated that the plaintiffs were willing, instead of the joint decree made by the Vice-Chancellor, to take a several decree against Carlton for £12,500, with interest at £4 per cent.; against Richardson for £7,500 only, with interest at the same rate; and against Grant for £65,000, with interest at the same rate; and that they were willing to allow Grant the whole expenses, which would be £6,250, and £9,000 for commission, which would be deducted from the £65,000.

COTTON, L.J.: I may state that the sum of £6,250 was arrived at as follows: for advertising, £3,185; for printing and postage, £1,640; for incidental expenses, £1,000; and for Mr. Duignan's costs, 500 guineas.

JAMES, L.J.: I think the company have acted very fairly in this matter, and have acted as honorable men in making [412] the offer as to costs, *charges, and expenses, and as to commission, and I am glad to keep them to their offer accordingly.

Solicitors for plaintiffs: *Tucker & Lake*, agents for Wragge, Evans & Jesson, Birmingham.

Solicitors for defendants: *Ashurst, Morris & Co.*; *J. Holmes*; *Duignan, & Smiles*; *Paule, Fearon & Coldkam*; *Robinson & Preston*; *E. Flux & Leadbitter*.

See 20 Eng. Rep., 124 note; 19 Eng. Rep., 719 note; 11 Eng. Rep., 483 note; 11 Eng. Rep. 112 note; 10 Eng. Rep., 516 note.

Equity will charge land, paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank for the amount so used.

On a bill in equity by a bank to charge land, alleged to have been paid for in part with money known to have been stolen from the bank, with a trust in its favor to the extent of the partial payment, evidence that a short time before the purchase of the land a son of the purchaser received from the thief, knowing it to have been stolen, about the amount of the partial payment; that the son was a minor living at home with his parents, and that neither the purchaser nor her husband had sufficient means to make such payment, will warrant a decree in favor of the plaintiff: *National, etc., v. Barry*, 125 Mass., 20.

It seems that trust funds, which have been misappropriated by the trustee, may be followed into lands to the purchase of which they have been applied, and the *cestui que trust* may elect either to hold the unfaithful trustee personally responsible, to claim the lands, the fruits of the misappropriation, or to cause the lands to be sold for his indemnity, and hold the trustee for any deficiency.

To follow the money into lands, however, and to impress them with the

trust, at least as against innocent third persons, the money must be distinctly traced and clearly proved to have been invested in the lands. It does not suffice to show possession of the trust funds by the trustee, and the purchase by him of, and payment for, lands. No presumption arises from the payment alone that it was made with the trust funds.

When trust money has been mingled with other moneys of the trustee so as to be indistinguishable, and the trustee has made investments generally with the moneys in his possession, the *cestui que trust* cannot claim a specific lien upon the property or funds constituting the investments: *Ferris v. Van Vechten*, 73 N. Y., 113.

If a wife, without her husband's knowledge or assent, deposits his wages, placed in her hands for safe keeping, in a savings bank, and uses the deposit with money of her own in the purchase of land, the title to which she takes and holds in her own name, the husband has an equitable interest in the land, to reach and apply which, in payment of his debt, a creditor of the husband may under the Gen. Sts., ch. 113, § 2, cl. 11, maintain a bill in equity against him and his wife: *Bresnahan v. Sheehan*, 125 Mass., 11.

Trustees guilty of a breach of trust who have lost the trust assets, and who have assigned property of their own to another as security, or in trust for the benefit of the *cestui que trust*, cannot have a decree for an account against

such third person without joining the *cestui que trust* or restoring the trust assets.

The assignee of such property, under such circumstances, becomes a trustee *de son tort*, and is accountable directly to the *cestui que trust*: *Potter v. Hopkin*, 10 Phila. Rep., 396; S. C., 32 Legal Intel., 66.

A sale by a trustee to himself, of trust property, is always voidable at the option of the *cestui que trust*.

A trustee who has taken a conveyance of lands of his testator from a purchaser thereof at a sale, in the notice of which such trustee joined with his co-trustees, and declared with them, by the conditions of sale, the terms upon which it must be made (thereby accepting the trust), cannot relieve himself from liability to his *cestui que trust* for the profits which he made on a resale of those lands, on the ground that he did not take out letters testamentary under testator's will: *Romaine v. Hendrickson*, 27 N. J. Eq. Rep., 162, affirmed 28 N. J. Eq., 275.

Where a trustee has made improper investments, the *cestui que trust* has an election to take the original fund and legal interest thereon, or to take the fund as invested at the time of the accounting, and all legal profits realized by the trustee thereon. In the latter case, however, in determining the profits realized by the trustee, the whole period during which he has held the fund is to be considered. The *cestui que trust* cannot take profits for one period and interest for another: *Baker v. Disbrow*, 18 Hun, 29; *Malone v. Kelly*, 54 Ala., 532.

A trustee who, through a purchase in his own name, and for his own benefit, of property belonging to the *cestui que trust*, in relation whereof he is trustee, from one holding the same in pledge, or hypothecation, or under a mortgage or lien, in a manner in which he is authorized to sell, acquires possession thereof, *is chargeable with a conversion*.

Although he acquires the possession rightfully for the purpose of the trust, yet if, where by the terms of the trust, the property is deliverable to the *cestui que trust*, he on demand refuses to deliver, *he is chargeable with a conversion*: *Smith v. Frost*, 42 N. Y. Superior Ct. R., 87.

The court cannot elect for an infant between a right to land and the following of the purchase-money into other land, without having such a case before it as will enable it to make an intelligent and effectual election, and a next friend has no power to make an election by filing a bill in one aspect alone.

Neither a resulting trust nor an implied trust, growing out of the relation of the parties and use of funds, will be enforced in equity against the holder of the legal title with an equal equity, even in favor of an infant; and a mortgagee for money advanced at the time may be such holder: *Haggard v. Benson*, 3 Tenn. Chy. R., 268.

Where a layman, dealing with a lawyer, manifestly against his intention and in plain ignorance of law, is led to do the very opposite of what he expresses his intention to do at the time, and to release another's rights as well as his own, and where the consideration for such release has never passed, a court of equity will disregard such release as obtained by imposition and misrepresentation (which may occur though not a false word has been said), misplaced confidence and surprises. The release not having been fairly entered into according to its tenor, a court of equity will neither enforce its execution nor make a new agreement for the parties: *Mellon v. Webster*, 5 Missouri App. Rep., 449.

A president of a corporation is a trustee, and will not be permitted to create such a relation between himself and the trust property as will make his own interest antagonistic to that of his beneficiary.

A president of a corporation, who has voluntarily purchased a small debt against the corporation, will be enjoined from levying an execution for the payment of a balance of the same, when he has already taken valuable property of the corporation in part payment thereof: *Brewster v. Startman*, 4 Mo. App., 41.

A trustee of a savings bank is liable at common law to the corporation for misapplication of the funds of the bank, and a receiver can enforce such liability. Trustees of a bank are but agents of the corporation, and each is liable for all damages occasioned by his violation of the duty he owes his

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principal, whether it consists in positive misconduct, neglect or omissions.

Where it is established that a trustee of a savings bank wilfully co-operated with other trustees to effect, and in effecting a declaration and payment of dividends when there were no surplus profits out of which they would be paid, held that for such misconduct, independent of any statutory enactments, he is liable to the corporation, or a creditor thereof, for the amount of such dividends: *Van Dyck v. McQuade*, 57 How. Pr., 62.

In an action, brought by the plaintiff as receiver of a savings bank, the complaint alleged that in 1871, and while the defendant was one of the trustees of the bank, he sold to it a lot for \$89,500; that a building was erected thereon by the bank for \$125,000, defendant being one of the building committee. That such sale was voidable at the option of the bank; that owing to the improvements it was not practicable, consistently with the rights and interests of the bank, to simply avoid the sale and receive back the purchase price, with interest, and asks that the defendant be compelled to take a reconveyance of the lot and building, and to pay to plaintiff the amount expended by the bank, with interest, or to pay the difference between the purchase price of \$89,500 and the value of the lot at the date of the judgment to be entered in such action.

Held that, as it appeared from the complaint that a simple avoidance of the sale of the lot purchased was impracticable, a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, should be sustained: *Paine v. Irwin*, 16 Hun, 390.

D. had a contract with the city, made while he was a member of the city government, for renewing a bridge which necessitated the removal of the old structure, and had collected his materials at the point where they were to be used. A controversy arose between D. and the city authorities as to the suitability of the materials; and the defendant, who was city marshal, by direction of the city authorities, for this reason, notified D. and his men not to remove the old bridge or proceed with the work. The defendant

knew that the plaintiff was in the employ of D., but on his refusal to desist from the work, arrested him without a warrant, committed him to jail until a warrant could be procured, and took him before the municipal court on a charge of obstructing the highway by removing the planking from the bridge. Held that, inasmuch as the city authorities, at the time of the arrest, had not claimed that the contract was void because D. was a member of the city government, or given any notice to that effect, but were insisting on performance, the contract could not be regarded as an absolute nullity, and that although the use of so much force as might be necessary to prevent the plaintiff from proceeding with the work might be justified, the arrest and imprisonment of the plaintiff without legal process was not justifiable. But held, further, that under all the circumstances of the case, the damages assessed (\$500) were grossly excessive: *Moore v. Durgin*, 68 Maine, 148.

Where a trustee wrongfully, or by mistake, pays money to a third person, supposing he was relieving the trust property from an incumbrance, he will not thereby be relieved from responsibility in the matter of his trust to the beneficiaries under the deed, and whatever the trustee's rights may be, the beneficiaries, in the absence of fraud, are entitled to no relief against the party wrongfully receiving the money: *Wason v. Garrett*, 2 Baxter's Tenn. Rep., 477.

Where a debtor conveys lands to his creditor in trust to sell, and from the proceeds to satisfy the debt and pay the balance to the debtor; and the debtor dies without having paid the debt, and without having elected to take the land instead of its proceeds, his personal representative is the proper party to compel the execution of the trust by a sale of the lands.

After such trust has been executed by a sale under a decree at the suit of the administrator, it is too late for the heir to elect to take the land.

If such a sale be tainted by the fraud of the purchaser, it is for the administrator, and not the heir, to impeach it on that account: *Craig v. Jennings*, 31 Ohio St. Rep., 84.

One in possession of land as trustee, purchaser, etc., cannot buy in an out-

standing title or purchase the land for taxes, and set up the title thus acquired to defeat the title of the *cestui que trust*, vendor, etc., in equity: *O'Halloran v. Fitzgerald*, 71 Ills., 53; *Fitzgerald v. Spain*, 30 Ark., 95; *Wilkinson v. Green*, 34 Mich., 221; *Watson v. Ryan*, 3 Tenn. Chy., 40; *Smith v. Osborn*, 86 Ills., 606; *Bull v. Southwick*, 70 N. Y., 581; *Knolls v. Barnhart*, 71 N. Y., 474.

Where land was left by the owner in the possession of one as tenant and agent, to look after the same and to acquire the title to a part, and such agent, after the owner's death, procured a third person to advance \$100 to secure the title for the benefit of the widow and heirs of the deceased owner, and gave him possession of the whole of the land out of which to reimburse himself, and such third person while so in possession suffered the lands to go to sale, and thereby acquired tax titles to the same; held, that he became a trustee for the heirs, and that the titles so acquired by him enured to the benefit of his *cestuis que trust*, but that he had a lien on the lands until reimbursed for all moneys advanced by him: *O'Halloran v. Fitzgerald*, 71 Ills., 53.

The rule is the same as to one tenant in common: 18 Eng. R., 650 note.

Colorado: *Gillett v. Gaffney*, 3 Col., 351.

Illinois: *Bracken v. Cooper*, 80 Ills., 221.

Iowa: *Weare v. Van Meter*, 42 Iowa, 128; *Flinn v. McKinley*, 44 Iowa, 68; *Burns v. Byrne*, 45 Iowa, 285.

Nevada: *Boskowitz v. Davis*, 12 Nev., 446.

Tennessee: *Tisdale v. Tisdale*, 2 Sneed, 596; *Sharp v. Williams*, Thomp. Tenn. Cas., 132.

Though the other tenant in common is not entitled to the benefit of such purchase until he pays his just proportion of the cost of such title: *Milton v. Tazewell*, 86 Ills., 29; *Smith v. Osborn*, 86 Ills., 606; *Rogers v. Vaughan*, 31 Ark., 62.

Where a widow occupied real estate mortgaged, and paid off the mortgage, it was held that as between her and the heirs it would be presumed to have been paid from the rents and profits: *Knolls v. Barnhart*, 71 N. Y., 474.

The holder of a first mortgage dis-

covering, during foreclosure, that certain taxes were a lien on the premises, paramount to all incumbrances, entered into an agreement, through his solicitor, with the solicitor of a second mortgagee, that if he, the first mortgagee, would pay the taxes, and the second mortgagee should buy the premises at the foreclosure sale, he should be repaid by the second mortgagee. After such payment, sale, and purchase, the second mortgagee refused to refund the amount of the taxes. Held that the first mortgagee could not be subrogated to the original lien of the township for the taxes, and have the amount paid by him decreed a lien on the lands: *Manning v. Tuthill*, 30 N. J. Eq., 29.

As a general rule, a tenant in common who buys in an outstanding title, holds it in trust for all. But there are exceptions to this rule and among them are:

1. Where facts wholly inconsistent with a trust are clearly made to appear.

2. Where the parties hold by the purchase of different titles, even though all came from a common source: *King v. Rowan*, 10 Heiskell's (Tenn.) Rep., 675.

A widow, who after the death of her husband occupies his residence, his children, some of them of age, living with her, is under no obligation to pay the taxes accruing thereon, between his death and the assignment of her dower.

Therefore, a purchase by her of the premises for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors: *Branson v. Yancy*, 1 Dev. N. C. Eq. R., 77.

One who purchases trust property with notice of the facts will be decreed to hold it in the same manner as his vendor: *Isom v. First Nat. Bank*, 52 Miss., 902.

Where A. and B. occupied separate floors of the same building, and A. had allowed B. to believe, before he took the lease, that he would not object to a sign in the balcony of the second floor; held, that A. could not restrain B. from putting up a sign there: *Garret v. Mulligan*, 52 Leg. Int., 142, 10 Phila. Rep., 339.

See 13 Eng. Rep., 550; 16 Eng. R., 698 note; 19 Eng. Rep., 290 note; *Goldsmith v. Jones*, 43 How. Prac., 415.

[6 Chancery Division, 412.]

M.R., April 11, 12, 19: C.A., June 25, 26, 1877.

PLIMPTON V. SPILLER (1).

[1876 P. 69.]

Patent—Novelty—Prior Publication—Book in Public Library—Specification—Subsidiary Claim not novel.

In order to invalidate a patent by prior book-publication, it is not enough to show that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the public.

Where a specification contains separate claims of two inventions, of which the second is to be used only in connection with and as subsidiary to the first, want of novelty in the second claim does not invalidate the patent.

In 1865 a patent for improvement in the construction of skates was granted to the agent of the inventor, who was a resident in America, and to whom the patent was afterwards assigned. Two years previously an American book containing a brief description of the invention (but not sufficiently particular to enable persons to manufacture the skates), and five weeks previously an American book of illustrations containing a drawing of the invention, were sent to the library of the Patent Office in London. This book of illustrations was not entered in the book of donations or in the catalogue, but it was placed on a bookshelf in a room open to the public, and was seen there by a librarian before the plaintiff's patent was taken out:

Held (affirming the decision of the Master of the Rolls), that there was no prior publication of the patent in this country.

The patentee claimed, first, a mode of applying rollers and runners to the footstand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as above described:

Held, that, assuming that there was nothing novel in the mode of securing the runners to the footstand, yet that the want of novelty in the second claim did not invalidate the patent, because the second claim must be read as claiming a subsidiary invention to be used only in connection with the principal invention.

THE action in this case was brought by J. L. Plimpton, the proprietor of Newton's patent for improvements in the 413] construction *of skates, against A. F. Spiller and T. Cross, to restrain them from infringing the patent.

Newton's patent was dated the 25th of August, 1865.

The claim was as follows:—

“First. Applying rollers or runners to the stock or footstand of a skate, as described, so that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left by the turning, canting, or tilting laterally of the stock or footstand.

“Second. The mode of securing the runners and making them reversible, as above described.”

The defendants denied the novelty of the invention, relying on certain cases of alleged prior publication and user, which were stated in their notice of objections as follows:—

(1) Affirming 19 Eng. R., 826.

"Before the date of the said alleged letters patent the alleged invention had been published in England in the (American) *Commissioners of Patents Journal* of the 6th February, 1863, and in the *Scientific American* of the 24th January, 1863, and a drawing or sketch in a book entitled, 'Illustrations accompanying the Report of the Commissioners of Patents for the year 1863 on Arts and Manufactures. Vol. 2. Engraved for Government by E. R. Jewett & Co., Buffalo, N. Y.,' which book was deposited in the Patent Office in the month of July, 1865.

"Before the date of the alleged patent the alleged invention had been publicly used by Mr. Mappin at Birmingham, and Mr. Farrin in London."

They also objected to the second claim in Newton's specification, as being too large and not novel; and they alleged that prior to the date of the letters patent the invention, so far as related to the second claim, had been in use by the public in England by bookbinders, and was familiar to mechanics as a bookbinder's plough and a bookbinder's portable screw press, and had been published in England in Tomlinson's *Cyclopædia of Useful Arts*.

The skates complained of as infringing the plaintiff's patent were the "Spiller," which differed from the "Plimpton" only in the use of a spiral spring instead of an india-rubber pad to restore the axis of the roller to equilibrium, and the "Wilson," in which a mechanical equivalent was [414 substituted for the inclined axis of the "Plimpton" skate.

In February, 1875, the plaintiff instituted a suit in Chancery against H. Malcolmson to restrain infringements of the same patent. The defendants on that occasion made a similar objection, on the ground of prior publication by the introduction of the American books into this country. The suit was heard before the Master of the Rolls, who, after carefully considering the evidence of prior publication, overruled the objections and established the validity of the plaintiff's patent (1).

The particulars of the invention and the evidence of prior publication are fully set forth in the report of that case.

The only new evidence as to prior publication of the invention, beyond the isolated instances alleged of its use in Birmingham and London, related to the copy of Jewett's *Illustrations* accompanying the Report of the Commissioners of Patents for the year 1863.

It appeared from the evidence in *Plimpton v. Malcolmson* that this book was received by Mr. Prosser, a sub-librarian

(1) *Plimpton v. Malcolmson*, 3 Ch. D., 531; 18 Eng. R., 649.

at the library of the Patent Office, on the 20th of July, 1865, and marked with his initials and the date when he received it; but that it was not entered in the book of donations, nor (so far as appeared and as was now affirmatively proved) in the catalogue, but was put into one of the private rooms, and remained there (so far as then was known) unnoticed till the year 1875. Under these circumstances the Master of the Rolls held that the existence of that book in the Patent Office Library did not amount to a publication.

In the present case the following further evidence as to this book was relied on by the defendants:—

Mr. Allison, a sub-librarian in the Patent Office, stated that in or about the spring of 1867, while they were removing the books from the old library to the new library, he saw the volume of Jewitt's book alluded to in the bookshelf in the corridor leading into the public room, which corridor was open to the public. At that time there were two volumes of that publication on the shelf, namely, the volume for 1861 and the book in question, which was published in 1863. 415] *It also appeared that in the new library the book was placed in a room upstairs, where the other American books were kept, and not in the principal room, and that the attention of the officials was first called to it by Mr. Spiller in 1875. Evidence was also adduced of the prior user of the invention in Birmingham and London.

On the 29th of November, 1876, the Master of the Rolls granted an interlocutory injunction restraining the defendants from making or selling any skate like the Wilson skate; and the Court of Appeal affirmed the order (*).

The action came on for trial on the 11th of April, 1877.

Matthews, Q.C., *Waller*, Q.C., and *Lawson*, for the plaintiff, contended that the Wilson and Spiller skates were infringements of the plaintiff's patent; but that question was not fully gone into, his Lordship having already intimated his opinion thereon as regarded the Wilson skate on the hearing of a motion in *Thorn v. Worthing Skating Rink Company* (*).

(*) 4 Ch. D., 286; 19 Eng. R., 826.

(*) 1876. M. R. Aug. 4:

THORN v. WORTHING SKATING RINK COMPANY.

THIS was a motion in an action by a licensee from Plimpton & Plimpton as plaintiffs against the Worthing Skating Rink Company, to restrain the defendant company from infringing the plaintiffs' patent by using the Wilson skate.

Matthews, Q.C., *Aston*, Q.C., *Waller*, Q.C., and *W. N. Lawson*, in support of the motion.

Davey, Q.C., *North*, Q.C., *Goodeve* and *Healey*, for the defendant company.

JESSEL, M.R.: This case comes before me on a motion for an interlocutory injunction upon a patent which has been already established, and therefore there is no question of the valid-

**Davey, Q.C., Goodeve, Warmington and Healey*, [416 for the defendants, contended that the further evidence in the case, in addition *to that adduced in *Plimpton* [417 v. *Malcolmson* (1), established the case of prior publication ;

ity of the patent on this occasion, and the only question I have to decide is, whether there is a case for an injunction. Now, what is the meaning of infringement?

I wish to take the law upon that subject from an address to the jury by the late Chief Justice Tindal in the case of *Walton v. Potter* (1 Webbs. P. R., 586, 587): "Where a party has obtained a patent for a new invention or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form or in immaterial circumstances the nature or subject-matter of that discovery, to obtain either a patent for it himself or to use it without the leave of the patentee, because that would be, in effect and in substance, an invasion of the right." Then comes the passage which I think is most important. The Chief Justice is speaking to the jury: "And, therefore, what you have to look at upon the present occasion is, not simply whether in form or in circumstances, that may be more or less immaterial, that which has been done by the defendants varies from the specification of the plaintiff's patent, but to see whether in reality, in substance, and in effect the defendants have availed themselves of the plaintiff's invention in order to make that fabric or to make that article which they have sold in the way of their trade; whether, in order to make that, they have availed themselves of the invention of the plaintiff." That is, he treats it as substance.

Now, in the present instance, I have, as usual, the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained since I have had the honor of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which expert evidence

is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the bar. He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty.

I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme case no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.

Then it is said sometimes, Why does not the court appoint an expert of its own?—a course which is sometimes taken by the court. It is very difficult to do so in cases of this kind. First of all the court has to find out an unbiased expert. That is very difficult. The court does not know how many of these experts have been consulted by the parties, either in the case of this particular patent or of a similar patent. It may turn out that a particular expert has been largely employed by the particular solicitor on the one side or the other in the case, and it is so extremely difficult to find out a really unbiased expert and a man who has no preconceived opinion or prejudice, that I have hitherto abstained from exercising the power which, no doubt, the

(1) 3 Ch. D., 531; 18 Eng. R., 649.

418] that there was also evidence of prior user; and *also that there was want of novelty as regarded the second part of the claim in Newton's patent.

JESSEL, M.R.: This case has been argued at considerable length—I do not say at inordinate length—and several points

court has of selecting an expert to give evidence before the court. That being so, it throws the court on its own limited resources, and they are always limited with respect to subject-matter of the patent, a matter which depends on a very great variety of circumstances; and although the court does derive, no doubt, a great deal of knowledge from the evidence of experts, yet of course, as we all know, in a subject matter with which a person is not familiar from long training serious mistakes may be made which will not be made by persons who are so acquainted. Still the court is not at liberty to retire from its proper functions of deciding the case, and it must decide it as well as it can under circumstances of difficulty which are always present to it.

Now, the real question I have to decide is whether the defendants' skate is, in substance, an infringement of the plaintiff's. First of all, the eye has something to do with it. When you come to compare the two things the conviction at once forces itself upon the mind, or at least it did on my mind, that the man who made Wilson's skate had seen Plimpton's skate, or a model of it. It turned out, singularly enough, at the end of the case, that I was informed as a fact that he had previously seen Spiller's, which I have already decided to be a mere imitation of Plimpton's. That turned out to be a fact proved in the case. That conviction had forced itself so strongly on my mind from the mere inspection of the two skates, that I expressed myself perhaps too strongly in saying that, even against the oath of the man who had invented the second skate, I did not believe it credible that he had not seen the first.

This is a very remarkable thing, because when you come to a question of substance, without going into mere detail and the fringe of the case, if they are so remarkably alike that you have to look for the differences, it becomes a very serious question whether it is

not an infringement. I take it that is the first test. Is it so like the patented thing that your mind is not directed in the first instance to dissimilarity, but to similarity. In other words, have you to examine it very carefully to find any distinction or difference? If that is the real position of the matter, *prima facie* it is an infringement, not necessarily so, because you may on examination find that what you had overlooked in the first instance was really so essential and important a part of the invention, that you ought to decide at once that it is not an infringement.

Then, having arrived at that conclusion on the inspection, the next thing is to see what really has been done. In one sense what has been done is undoubtedly a mechanical equivalent. Whether it is a mechanical equivalent in the sense in which that expression is used in patent law is of course the question I have to decide. There can be no doubt that a mechanic having the first skate given to him, and being asked to produce the same result by a mechanical equivalent, would have produced, amongst other things, the second skate, if he produced anything at all. No doubt in that sense it is a mechanical equivalent. If I took the first skate and gave it to an ingenious workman, and said, "I want to evade that patent, therefore make me a skate which will do all that skate does, but mind you must not have that diagonal axis," I have no doubt he would forthwith produce the other, or something very like it, because I can see at once that the same result can be produced in another way. I can imagine a combination of two axes which would produce the same result without the universal joint or guide, and I dare say there are several other ways of doing it besides, in which an ingenious mechanic could shape it. Indeed, I recollect that in the case of *Plimpton v. Mulcolmon* (3 Ch. D., 531) a workman had discovered another way of obtaining the same result.

Then the question is, whether the

are raised, which I will mention in their order, some for the first time, and some which were raised in the case of *Plimpton v. Malcolmson* (¹). But, inasmuch as I was the judge who decided *Plimpton v. Malcolmson*, the counsel for the defendants considering that it was not very probable that any observations they might make on points decided there, and as to which there was no variation in the evidence, would induce me to reverse my own decision, and as it is intended to take the case to the Court of Appeal, abstained from arguing further those points, they being left open to them on the hearing of the appeal. I think that was a wise course, and a fair course to adopt both to their clients and the public, and I see no reason whatever to change my opinion which I formed and expressed with reference to this patent in the report of *Plimpton v. Malcolmson*.

I will now consider the new points which are relied upon, and which were not discussed in *Plimpton v. Malcolmson*. The first issue is want of novelty, and as the Appeal Court will have my judgment in *Plimpton v. Malcolmson* (¹) before them, I shall avoid repeating what I have there said.

The want of novelty relied upon is, first of all, prior publication. The prior publication is attempted to be made out in two ways: first, prior publication in the sense of actual communication in this country, and sale and user before the date of Mr. Plimpton's patent in August, 1865; and, secondly, prior publication by the transmission to this country of copies of the *Scientific American* and the *Commissioners of Patents Journal*, and a copy of a book which is called "Jewitt's Book," which contained a drawing attached to Mr. Plimpton's American patent. As regards that book I gave a long judgment in *Plimpton v. Malcolmson* (¹), but it is right to advert to it, because the evidence now adduced shows that one fact was not known—certainly

claim made by the plaintiff of his machine is in substance invaded or evaded by what the defendant has done. In my opinion it is. I cannot put it in any other way than that. It is the opinion the court arrives at by comparing the two things. Of course I am not giving a final judgment upon it, because I shall have hereafter to hear evidence and to have the benefit of the cross-examination of the witnesses, more especially the experts, but without finally deciding it, it does appear to me that in substance it is a

mere invasion of the plaintiffs' patent. It is a deliberate attempt of a man who has seen the plaintiffs' patent to make in substance the same thing with a mere colorable change or variation, so that he shall not take something which can be conceived to be more or less a material part of the plaintiffs' specification.

That being so, I think the plaintiffs are entitled to the injunction they ask.

(¹) 3 Ch. D., 581; 18 Eng. R., 649.

(²) 3 Ch. D., 565; 18 Eng. R., 680.

it was not known to me at the time I gave that judgment—and it is said to have a material bearing upon the case.

The law I laid down as regards that in *Plimpton v. Malcolmson* I adhere to, namely, that the question is whether the book has been published in the sense in which I think it ought to be made known to amount to a prior publication so as to invalidate the patent. The evidence is singular, and probably unique. I do not suppose any such case ever happened before, and it arises from circumstances which I believe are very unlikely to occur again.

The American civil war interrupted the regular communication between the United States and this country, and, according to the practice of the two countries, each set of the Commissioners of Patents communicates to the other the patents taken out in the country, which for these purposes is a foreign country, that is to say, the British Commissioners send copies of their patents to the American Commissioners, and the American Commissioners send copies of their patents to the British Commissioners.

The American patents, like English patents, consist of two parts, text and drawings, and where there are drawings they are of course separate from the text. The custom of the American Commissioners was to send regularly over here copies of their specifications and drawings. That was 420] interrupted by the civil *war, and they did not then reach this country. Of course the librarian at the Patent Office and the officials would have been glad to have obtained copies of the specifications and drawings in order that that information which is much sought after by patentees in this country might be afforded, that is, a knowledge of what is being done in America with reference to the same subject. It does appear that on the 20th of July, 1865, the book in question reached this country. Mr. Jewitt was the publisher for the American Commissioners, and he also published in a separate book copies of the principal drawings on rather a large scale. Having previously presented a former volume of his book to the Patent Office librarian, he sent a copy of that book, and I am quite satisfied that the book was in the Patent Office on the 20th of July, 1865.

Then the next question is, what became of that book. The history of that book, which, as far as I know and believe, was the solitary copy that reached this country before August, 1865, is this: By the same mail there came a parcel of American publications, of which this was by far the most important, and one which, if Mr. Atkinson, the librarian, had been aware of it, he would have considered of the

greatest importance. No doubt he would have made an announcement of it, so that the frequenters of the library should know that a large volume containing American patents and drawings had arrived, the transmission having been so long interrupted. Mr. Prosser, having made his note in the book, ought to have taken it to Mr. Atkinson's room, but he has no recollection of what he did with it. It is a very large book, and one which, if put on the table, must have attracted Mr. Atkinson's attention. Then we have this fact, that he did make an entry in his donation book on that day of two other volumes that arrived by the same mail from America, which must have been in the same parcel, and there is no entry of this book. How to account for that is very difficult. My own theory is, that it dropped out of the parcel somehow, and never reached Mr. Atkinson's table at all. That he never saw it is clear; that he never opened it is certain; because if he had once opened it he would have seen its importance. He is a librarian of forty years' experience, and I may say from my own knowledge he is rather distinguished by over-love for *his [42] library than any other quality. My conjecture is that he never saw it at all.

Then there is this to be said, that in all his experience he does not know of a single instance of a book having been given to the library without being entered in the Donation Book. It is never seen any more there until one of the assistants in the library says he saw it just before the books were removed from the old library to the new library. I cannot say that it is proved to my satisfaction whether that was in the year 1866 or 1867. My impression is, if it were left upon this evidence alone, that I should prefer 1867: the library was then removed, but all the books were not taken at the same time. When this lot of books went, of course depends upon imperfect recollection. It does not however much matter whether it was in the year 1866 or 1867 for my purpose. My impression is that it was 1867. But it is then seen, not in the public room in the old library, for there was a public room in the old library as there is in the new, but in the corridor leading to the public room, to which corridor the public have access. The public walk through there, and they might, if they thought fit, walk up one of the ladders and take a book down from the shelves. This book was emphatically on the shelf. It was not put in the Library Catalogue, that being the book to which visitors look, and being in two parts, one of which describes simply the books which are in the library; and if it is a periodical, such as

the *Times* newspaper, they would call it "*The Times*," and leave it there. If you want to ascertain what the volume is composed of, then you look at another catalogue which gives you date and description of every volume of the periodical, if it is in volumes, and if Mr. Atkinson had known of it he would have put it in that catalogue as he had Mr. Jewitt's smaller book. But it never got there, and where the book was on the 25th of August, 1865, I have not the slightest idea. One may guess that it got into the corridor before 1865 if you like. I see no reason to guess why it should have got there before or afterwards. Having come to the conclusion that it was mislaid somehow and afterwards found by some one and put in the corridor, there is nothing to show that it was in the corridor on the 25th of August, 1865. My impression is rather against it, but I 422] give no positive opinion *upon the matter. But supposing it got there, was it accessible to the public in the proper sense of the word? There are only two ways in which the public could find out whether that book was there, either by consulting the catalogue or by going to the librarian. Mr. Atkinson certainly did not know of it, and therefore it was of no use to ask him. It was not in the catalogue, therefore it was of no use consulting it, nor was there any use in consulting the Donation Book. How the public could find, except by accident, that the book was on the top shelf in the corridor it is impossible to say. Therefore, practically it would be laid on the shelf in the popular sense of the word. No one would know of its existence even if it got into the high shelf of the corridor; but practically I am satisfied that no one knew of it. The question does not arise as to whether, if it had been in the corridor, I ought to presume the public knew of it. That point does not now arise, but my own opinion is that that alone would not do. If I come to the conclusion, as I do, that no human being in this country, that neither the librarian nor assistant librarian nor any one else had ever seen this plate on the 25th of August, 1865, and that there was no fair knowledge communicated to the public of the existence of this plate in this country in August, 1865 (on both of which points I have arrived at a positive conclusion), I hold there was no sufficient publication to invalidate the patent. I have already said that if there had been I should have arrived at the same conclusion.

[His Lordship then reviewed the evidence as to the alleged prior user of the roller skates in Birmingham and London

in the spring of 1865, which he considered not to be established.]

Now I come to another point, which is a very material point, although it is a small one, and that is the want of novelty as regards the second claim in Mr. Newton's patent. I have remarked before in the case of *Hinks & Son v. Safety Lightning Company* ('), that it is the duty of the judge to construe a specification fairly with a judicial anxiety to support a really useful invention if it can be supported upon a reasonable interpretation of the patent; or as Mr. Aston said, that a judge is not to be astute to find flaws in small matters in a specification with a view to overthrow it. *Any man acquainted with the patents of this coun- [423 try, and the patent law, knows perfectly well that it is very strict, hard, and technical against inventors as it stands. The want of power to amend the specification of an invention in a trying point often prevents an excellent and useful thing, which has given the patentee the greatest trouble and anxiety and shows the exercise of remarkable powers of invention, from being secured to him, merely because some slip has been made, as it is too frequently the case.

There are few patents of complicated inventions even as regards the text and drawings where some mistake or other is not made. Accuracy, as we all know, is very difficult of attainment; and when the judge sees that there is a real substantial invention of great merit, and the description is fairly made, so that a competent workman can make the invention, it is not his duty to endeavor to construe the patent so as to make it claim that which it is utterly absurd to suppose would be claimed, because it is so well known as a matter of public notoriety, that nobody would think of claiming such a thing. I am going to read this claim with the knowledge that I possess (which I am entitled to do) from the evidence as to what is alleged on the part of the defendants to be really claimed by it.

Now, it must be remembered that, according to the evidence, the use of a clamp or a vice to hold something, such vice or clamp being made to have its cheeks or holders approach nearer by the means of turning a screw, is an invention so old that no human being would think of claiming it. One of the witnesses said that you might see it in every blacksmith's shop, and another said you might see it in nearly every workshop. Therefore it is not probable that Mr. Newton intended to claim it. Consequently when we come to read the claim, I think it is fair to say that, if it

(¹) 4 Ch. D., 607; 20 Eng. Rep., 785.

can be read in two ways, one claiming something that has a merit of novelty, and the other claiming something which would show the man to be ignorant of all the ordinary appliances used in every workshop in the world, it is the duty of the judge to adopt the construction which makes the patent reasonable and sensible, rather than that construction which makes the patent utterly absurd.

424] *What Mr. Plimpton says is this: "When the invention is to be used on ice, runners are employed, constructed and applied as follows." Then he describes the application of the substitute for the rollers. The roller is used when you are skating on an ordinary level surface; and the two pairs of runners, as described in the drawings, are used when you are skating on ice. Is the word "runners" to be taken for the slip or bit of iron between the clamps, or the contrivance by which the runner is secured or fastened first of all in the clamp, which then is fastened or secured to the footstock? Now, it is not contended that if the second claim includes the mode of affixing or applying the runner to the footstock, that is, if it includes the clamp and the mode of affixing the clamp, there is not sufficient novelty. If, on the other hand, it is to be restricted to simply the mode of fastening the little piece of iron or runner in the clamp, then it is said to be undistinguishable from the ordinary vice, and not to be novel.

Now, the words are these: "The mode of securing the runners and making them reversible as above described;" which am I to take? Am I to take the mode of securing the runners to be new, or to be that which is alleged by the defendants, the putting of the bit of iron in the clamp, which is not only not new, but is known to every one who has been in a workshop. No doubt it is my duty, if there is nothing else in the matter, to adopt that which would make sense of the patent instead of that which would make it useless. I may also observe that the use of the word "simply" in the specification with reference to the mode in which the runner is secured in the clamp shows that that was not intended to be claimed. I am of opinion, therefore, that this objection as to novelty also fails.

Then the next point is the infringement. There are two skates that have been made in this case: as regards the skate of Mr. Spiller, it is so obviously an infringement that on inspection it requires time and care to ascertain the difference. The skate is substantially the same as Mr. Plimpton's. As regards Mr. Wilson's skate, it is to be regarded for the purposes of this action to be in issue. But it was

admitted by Mr. Edwards, on cross-examination, that there was no substantial variation between the Plimpton and the Spiller skate and the Wilson skate. In the *latter [425 there was the substitution of guides for a second axle, but the purpose was the same, and the guides so substituted were stated to be a mere mechanical equivalent, that is to say, you obtain the same purpose by substituting guides for an axle, which is a mere mechanical movement. The second skate, therefore, is an infringement of the first patented invention, because it has everything against which we have most to guard. It was proved to have actually happened. They put the skate into the hands of a competent mechanic, and wanting to produce the same result, they make use of the well-known equivalent, and then they produce the skate. It is the exact thing which has been proved to have been done, which is prohibited by law. It is, therefore, an infringement.

The result is, that I find on all the issues for the plaintiff, and the same order will be made as in *Plimpton v. Malcolmson* (*).

From this decision the defendants appealed. The appeal came on for hearing on the 25th of June.

Davey, Q.C., North, Q.C., (Goodeve with them), for the appellants: The claim, especially the second clause in it, which claims the invention of the mode of fixing the runners, is too large. The word "runners" means the metal blades fixed in the clamp, not the whole machinery substituted for the rollers. The mode of fixing metal blades between two sides of wood or metal was well known before, and is not a fit subject for a patent. The claim, if too wide on the face of it, cannot be confined by referring it to the description in the specification: *Harris v. Anderston Foundry Company* (*); *Hinks & Co. v. Safety Lighting Company* (*); *Clark v. Adie* (*); *Neilson v. Betts* (*).

In the second place, the deposit of the American book of illustrations in the library of the Patent Office in London was a prior publication of the patent. The evidence now before the court differs from that which was before the Master of the Rolls in **Plimpton v. Malcolmson* (*). [426 It now appears that in 1867 the book was seen in the bookshelf side by side with the previous volume of the same work in a corridor which was open to the public.

(*) 3 Ch. D., 531; 18 Eng. R., 649.

(*) 1 App. Cas., 574.

(*) 4 Ch. D., 607; 20 Eng. R., 785.

(*) 2 App. Cas., 315.

(*) Law Rep., 6 H. L., 1.

This was a dedication to the public, and thereby the illustration in the book became an addition to the stock of public information; the fact that it was not catalogued made no difference. It is sufficient that it was so placed that the public might have access to it: *Stead v. Williams* (¹); *Stead v. Anderson* (²); *Lang v. Gisborne* (³); Heurteloup's Patent (⁴).

Matthews, Q.C., *Aston*, Q.C., *Waller*, Q.C., and *Lawson*, for the plaintiff, were not called on.

JAMES, L.J.: Two objections have been taken to the validity of the patent and to the judgment of the Master of the Rolls in this case. The first is with reference to the construction of what is called the second claim, and if it were necessary to consider whether the Master of the Rolls' construction of that claim was right or wrong we should probably have desired to have heard further argument; because I am bound to say that my present notion, or rather my present impression, for that is all I am entitled to say, is, that the second claim simply uses the word "runner" as being the blade, and the blade as fastened in that particular way. But in my opinion that is wholly immaterial when we consider what the claim is and how it is to be construed with reference to the entire patent.

It is important to bear in mind that there is nothing in the act or in the patent law which says anything about claims. A patentee gets a patent for his invention, and he is obliged to specify that invention in such a way as to show to the public not only the mode of giving practical effect to that invention, but what the limits of the invention are for which his patent is taken out; and the real object of what is called a claim, which is now much more commonly put in than it 427] used to be formerly, is not to *claim anything which is not mentioned in the specification, but to disclaim something. A man who has invented something gives in detail the whole of the machine in his specification. In doing that he is of necessity very frequently obliged to give details of things which are perfectly known and in common use—he describes new combinations of old things to produce a new result, or something of that kind. Therefore, having described his invention, and the mode of carrying that invention into effect, by way of security, he says: "But take notice I do not claim the whole of that machine, I do not claim the whole of that *modus operandi*, but that which is new, and that which I claim is that which I am now about

(¹) 2 Webs. P. R., 126.

(²) 2 Webs. P. R., 147.

(³) 81 Beav., 133.

(⁴) 1 Webs. P. R., 538.

to state." That really is the legitimate object of a claim, and you must always construe a claim with reference to the whole context of a specification.

Now, we have to consider what is the effect of this part of the claim. He says, "I claim first," and so on—and then he says, "Secondly, the mode of securing the runners and making them reversible as above described." Now, I agree with the Master of the Rolls that it is too absurd for any one to suppose that a man was claiming in the year 1865 as a distinct and substantive invention the putting of a piece of metal between two pieces of wood, and tightening them so as to hold that piece of metal fixed. That is a thing which no doubt was done even before metal was used. I suppose the very first stone implements were fastened into wood in that way, and the wood tightened round them so as to hold them fast. Therefore, the fact of putting something into two holders and screwing them up tight is a thing perfectly well known, and it is utterly impossible to suppose that the patentee was claiming as an invention a mode of securing a thing between two holders in such a manner as that he could take it out when he wanted to change it. And we have this to bear in mind also, that the whole of the patent is for one particular object, which is thus described: "The invention relates to an improvement in attaching the rollers or runners to the stock or footstand of the skate, whereby the rollers or runners are made to turn or cant by the rocking of the stock or footstand so as to assume radii of a circle, and facilitate the turning of the skate on the ice or floor, and admit of the skater performing with ease gyrations or evolutions *without [428 taxing unduly the muscles of the foot or ankles." That is the invention, and the only thing which is protected by the patent, or that could be supposed to be protected by the patent, is that mode of turning or canting by the rocking of the stock or footstand so as to give greater ease to the skater in performing these evolutions. Well, in describing the machine for that purpose the patentee gives a very minute description of the mode in which he does it, and as a mode, and as a very convenient and advantageous mode, he says, "I not only make the runners in this way, but I make them in such a manner as that the 'runner,' that is to say the piece of metal can, if convenient, be taken out and turned, and used four times running, and I shall show you how I do that." That is what he has done in the description of the thing, and then he claims the applying of it to rollers. Then, secondly, he claims "the mode of securing the run-

ners and making them reversible as above described." According to my view, and according to the fair and legitimate construction of the claim, he says, "I claim that as part of and in connection with my runner skates. In my runner skates I have introduced a very convenient and useful thing—a mode of making these runners useful four times over."

It appears to me that in doing that he is claiming, not a distinct and substantive invention, but he is claiming it as one of the merits and advantages of the entire construction which he has before given, and he is not in any way pretending or claiming to enlarge his monopoly; because of course it was novelty as far as Plimpton's skates are concerned, for Plimpton's skates were novel, and he is only applying an old thing to an entirely new thing. When the new thing ceases to be patented that old thing will cease to be patented too; so that there is really no pretence for saying that he is endeavoring to obtain under the color of that second claim something other and beyond that which the invention itself purports to be, that is to say, an invention for making a rocking skate in the manner which he has described in the first part.

That being so, it seems to me to be wholly immaterial what the exact construction of those words is, because after all that second claim really comes to nothing more than 429] is included in the *description of the invention itself. I mean that part of the invention which describes the runners; and the words "the mode of securing the runners and making them reversible." It seems to me to be perfectly idle and superfluous to the claim in the first part. They neither add to nor diminish from the patent, nor the monopoly which the patentee is seeking to obtain against the public.

I am therefore of opinion that there is really nothing in that objection, an objection which has been found out no doubt by persons microscopically scanning the thing afterwards, and giving it a meaning which it was never intended to have so as to apply to skates in general, or to every case in which a piece of metal is held between two parallel holders.

Then that objection failing, as it appears to me it ought to fail, we come to consider the next point with regard to the publication. In this particular case it is not necessary, I think, that we should lay down anything other than has been laid down in the cases which have been referred to: *Stead v. Williams* (*), and *Stead v. Anderson* (*). It is not necessary for us to lay down any new canon or rule as to

(*) 2 Weba. P. R., 126.

(*) 2 Weba. P. R., 147.

what constitutes or does not constitute publication—as to how far a book in a public library may or may not be a publication, but I agree with the conclusion that the Master of the Rolls has arrived at in this case, that as a matter of fact it is impossible to say that this American book ever was in the library in any sense in which it could be construed to be accessible to the public, or that portion of the public which consists of persons conversant with this particular subject, or to patentees who are desirous of taking out patents for new inventions, and therefore desirous of making themselves acquainted with the course of inventions generally. It appears to me that the evidence is too slight to warrant any inference whatever that between the 20th of July and the 25th of August, 1865, that book which was sent over from America to this country was ever in such a position as to be, practically speaking, accessible to any part of the public.

That being so, it is not necessary to go further; but I should, if it were necessary, desire much further time to consider whether, even if it were proved that the book, one copy of which had been *sent over as a present from [430 a gentleman in America, was on the shelf in the library between the 20th of July and the 25th of August, that would be a sufficient publication, and would be such an addition to the stock of common knowledge in this country as would have prevented a man from being the first and true inventor of this patent; such an addition to the stock of common knowledge as a man was not entitled (to use the language of one of the cases) to deprive the public of. In these circumstances I am of opinion that the Master of the Rolls' decision was right, and ought to be affirmed.

BAGGALLAY, L. J.: The argument which has been addressed to us on behalf of the appellants has been based upon the circumstance that two claims are made by the specification, and as regards the first of those claims it has been contended that the patent cannot be upheld by reason of the prior publication of the invention, and as regards the second, by reason of want of novelty. I will adopt the course which has been adopted by the counsel for the appellants and by the Lord Justice, and deal with the second of these points first. Now I agree with the view which has been expressed by the Lord Justice, that the word "runners" is used in the second clause of the claim in the sense of describing pieces of metal which can be released from the other portion of the machinery and inverted or changed about from one direction to the other. I think also that in

this specification the word "runners" has been used in two senses. It has been used in the first place to describe the whole of that part of the machinery which is substituted for the roller when the skate is to be used upon ice, and in the second part to denote a part of the runner described in the first part, namely, that by which the running is effected. I think it is clear that in the earlier part the word "runner" is used by way of alternative to "rollers." It is not necessary to refer to the passages in the specification, but the words "rollers or runners" occur at least half a dozen times; particularly with reference to the description in the plates, and it will be seen that in several of these instances the word "runners" is applicable to the whole of that part of the machinery of which we had the model here 431] before us yesterday: *again, when the machinery has been clearly described with reference to the rollers, we find the word "runner" introduced in the following terms: "When the invention is to be used upon ice, runners are employed, constructed, and applied as follows." There, no doubt, the word "runner" is used to describe that which is substituted for the rollers described in the earlier part of the specification.

But when you come to the description of the various portions of what is called the "runner" in the previous part of the specification, you find a piece of metal, which is only a part of the machinery, indicated by the letter *I* and called the "runner," and it is stated to have a smooth surface and angular edges, and to be capable of being reversed.

On the whole, therefore, not having heard any argument from the respondents in the contrary direction, I am of opinion, as at present advised, that the word "runner" is used in the second part of this claim to describe a portion only of that which is called a runner in the earlier part of the specification.

Now, in my opinion, as at present advised, the second claim is not included in the first. As I read it, the first claim is for applying rollers or runners to the stock, or footstand, of the skate as described, so as to produce the result "that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left by the turning, canting, or tilting laterally of the stock or footstand." I think that there the reference is to what I may call the attachment of the runner to the stock or footstand by means of a peculiar hanger, a sort of lever action which is in the hanger.

But what I think is described by the second part of the claim is this. The particular mode of securing the runner or metal plate between two other metal plates, so as to make it reversible. Now, if I could read that as a mere general description of fastening a piece of metal between two other pieces of metal by a screw, of course it would be idle to suppose that that could be the subject-matter of a patent. But I think you must read the second claim with reference to what the inventor has described and claimed above, and then it is for the mode of securing the runners of the skates above described, and making them reversible.

*I do not understand it to be suggested that the [432 application of four runners to a skate in such a mode as is suggested, and the placing them in such a way as that you can change them either fore and aft or up and down has ever been suggested before, and certainly it is clearly in respect of that subject-matter useful. The use is pointed out in the terms of the specification, and it appears to me upon this view of the case that it is impossible to hold that there is a want of novelty such as has been suggested on the part of the appellants.

As regards the objection to the first claim of prior publication, I do not propose to express any opinion as to what might have been the case if there had been evidence that the volume of illustrations had been sent over to England, and had been placed in the library a sufficient time before the date of the letters patent, had been catalogued in the usual way and had been so placed in the library as to be accessible to the public using that library. That certainly would be evidence of prior publication, and I must say very strong evidence indeed. But we have not got any such case here. So far as I can draw any inference from the evidence before us, I am very much disposed to adopt the view suggested by the Master of the Rolls, that in some way or other after this volume of illustrations reached the hands of the officials of the Patent Office on the 20th of July it became misplaced and never found its way into the library, or even into the corridor leading to the library, until after the date of the letters patent. But whether that view of the case be correct or not, if this prior publication is relied upon, it must be proved, and it appears to me there is an entire want of evidence to support that part of this case.

BRETT, L.J.: I think it is right to observe upon the nature of the objection to this suit, that it is brought to prevent the actual infringement of a real substantial invention, and it is not now denied that that invention, is a

valuable invention, and that substantially it has been infringed. But then, in order to defeat the plaintiff, there is an ingenious suggestion that a minor and wholly inappreciable claim has been made of something which is not novel. The plaintiff has not complained of anybody infringing that particular part of *the claim, and nobody has actually infringed that particular part of the claim. It is, therefore, an objection which may be properly styled to be a lawyer's objection. It is not denied that if this claim be erroneous it may be disclaimed to-morrow. Therefore, the only object of this objection is to prevent the plaintiff from obtaining that which in substance it is admitted he is entitled to claim, and under these circumstances I agree with the Master of the Rolls that the court ought to be anything but astute to support such an objection.

At the same time I think it cannot be denied that if a really independent claim of something which is not new, however inadvertently or carelessly it be made, is in fact made on the face of the patent, the court is bound to hold that the patent is therefore objectionable, and that therefore the plaintiff cannot succeed.

If this second claim had been in a form which would have applied to the runner of any other skate than that which is patented here, I should have thought it would have been bad, and that therefore the whole patent would have been bad, and that this plaintiff could never recover.

But I am of opinion, not looking at this objection too astutely, as I say, that this second claim is so stated as to be confined to the runners of the particular skate of the patentee in the same patent, and which skate is well patented—I say that I think it is so confined for the reasons which have been given by Lord Justice James. I think it, however, right to refer to the description of the invention, which clearly shows that it is an invention of the whole of the skate, and that this subsidiary manner of securing the runner and making it reversible is not at all contained in the description of the real invention; and when you come to read further the words of the claim itself, it is not the mode of securing the runners to skates and making them reversible which is claimed, but it is the mode of securing the runners “as above described.” Reading that, and interpreting it in conjunction with the description of the invention, I read the mode of securing the runners to the skates and making the runners of these skates reversible as intended to apply to the runners which are “above described,” and those are the runners of those skates and of no others.

*If that be so, let us consider what the result must [434 be if a person have a license or a right by purchase to use the skate which is thus patented, and which is well patented. He has the same right either by license or purchase to use the runners, and having the license to use the skate, if he use the runners he is guilty of no infringement at all. No one, as a matter of fact, who uses this runner (upon the assumption that it is the runner of this skate), could use it without using the skate, and if he have a license to use the skate, or if he have a right to use the skate, he has the same license and the same right to use the runner. If he has no license or right to use the skate, by using the runner, which he cannot upon the assumption use without using the skate, he uses the skate and infringes the real patent. Therefore you cannot, from the fact of any one using this runner or selling it for the purpose of use, make him liable for anything unless he infringes the patent itself. If he has not a right to the patent he cannot use the runner without infringing the patent for the skate.

Under these circumstances, confining this claim to the runner of the patented skate, it is obvious that the claim, whatever it be for, with regard to this runner, does not in any way increase the monopoly of the good patent, and if you can say that the subsidiary claim in the patent cannot, under any circumstances, increase the monopoly of the patent itself which is well claimed in the patent, it seems to me that the subsidiary claim is unimportant, is futile, has no effect, and therefore does not raise any objection to the patent. If you can bring it within the category of a subsidiary claim in the patent, you bring it within the principle stated by Lord Westbury (¹), and under these circumstances it is no objection to the patent. I therefore consider that this second claim is no objection to this patent, because it is a futile claim, and has no effect upon the monopoly.

With regard to the question of publication, I must say I entirely and absolutely agree with the proposition of law laid down by the Master of the Rolls. It seems to me that the real question to be decided by the court with regard to this matter is whether the invention was before the patent in question known to *the public in the sense that [435 the Master of the Rolls has described, i.e., not known to all the public, but known to a sufficient number, so that you may properly say it was known in England.

In order to prove or disprove that fundamental proposi-

(¹) *Neilson v. Belle*, Law Rep., 5 H. L., 21.

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tion, you may show by way of evidence that there has been a prior invention, and that it has become as a fact, although it has never been written, known to the people in the trade. That is what Baron Parke says in *Stead v. Anderson* (¹), that it has become generally known in the sense that it has become known to the people in the trade. That is only one form of evidence which may be given in proof of the fundamental proposition. Another mode of proving the fundamental proposition is to show that a description of the invention has been published. But, then, to show that, it is not sufficient merely to show that it has been published in one sheet or book. As Baron Parke himself says, "Published means offered or dedicated to the public." He then goes on to say that the question with regard to that is, was the invention published or offered to the public to such an extent as that it was generally known among engineers or persons interested in the matter? The mere fact of its being dedicated, the mere fact of its being published, is not sufficient, it must be so far published as that you may fairly say it is known to a sufficient number of the public.

Therefore I cannot agree with Mr. Davey when he says that it is sufficient to show that the thing has been printed in a book, and that that book has been so placed that it might have been known to the public. It must be not only printed in a book, but that book must be placed in such a position and so used that you may fairly infer or assume that the contents of the book have become known to a sufficient number of people. Therefore, when you prove that this book was put in the Patent Library, I care not into what part, I do not say that is no evidence of its having become known to the public, but I say that when you have other facts which show that although it was put into the Patent Library the proper inference is that nobody ever did see it there or elsewhere, then, although it has been in one sense, if you please, published, or in one sense, if you please, intended to be dedicated to the public, all I can say is that 436] the public have not been able to take advantage *of the dedication or the publication, and therefore you do not show that it was known to the public.

The consequence is that I am of opinion the Master of the Rolls has drawn a proper inference—an inference which a jury would be entitled to draw—an inference which I myself draw, and which shows that the proposition which lay upon the defendants was not proved, namely, that this in-

(¹) 2 Webs. P. R., 147, 148.

vention was made known in England before the time of this patent.

Solicitors for plaintiff: *Ward, Mills, Witham & Lambert.*
Solicitors for defendants: *Tidy, Herbert & Tidy.*

[6 Chancery Division, 436.]

M.R., Aug. 8, 1876: C.A., March 6, 9, 18, 23, 1877.

TRAVERS V. BLUNDELL.

[1876 T. 112.]

Will—Appointment—Mistake—False Demonstratio—Enumeration of Closes of Estate—Omission of Two Closes.

A testator gave all that part of Rigby's estate purchased by him consisting of closes A., B., C., D., E., and F., with the timber and coal mines, to trustees in trust for his son J. O. for life, with remainder to the use of J. O.'s children as he should by deed or will appoint, and in default of appointment to the use of J. O.'s right heirs. J. O., by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of Rigby's estate purchased by his said father consisting of A., C., B., and F., with the timber, but not including the mines, to his two sons T. and J.; and he appointed the mines under the land which he had appointed to T. and J. to his four other children. The two omitted closes, D. and E., lay between the other four.

A special case having been filed to obtain the opinion of the court whether the two closes D. and E. passed under the appointment to T. and J.:

Held (affirming the decision of the Master of the Rolls), that the corpus of the estate devised by the father was sufficiently designated in the son's will, that the enumeration of the four closes instead of the six was a *falsa demonstratio* which might be rejected; and that the whole of the six closes passed under the appointment.

SPECIAL CASE. Thoms Oldham, by his will, dated the 23d of May, 1832, gave and devised as follows:—

"I give and devise to R. Evans, J. Forster, and E. Hemsley, *their heirs and assigns, all my freehold estate [437 and property in the parish of Pemberton, near Wigan, in the county palatine of Lancaster, and all that part of Rigby's estate purchased by me situate as aforesaid consisting of Limekiln Meadow, Fingerpost Meadow, Kitchen Pasture, Great Pasture Field, Billing's Meadow, and Middle Meadow, with the timber growing thereon, together with all the coal and other mines and appurtenances thereto belonging, or being upon or under the same, and also the three freehold cottages left to me by my grandfather, situate and being in a place called 'Nook,' or 'Lamberhead Green,' in the parish of Orrell, near Wigan aforesaid, with their rights, members, and appurtenances, to have and to hold, &c., unto the said R. Evans, J. Forster, and E. Hemsley, to the uses and for the intents and purposes thereafter declared."

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And the testator declared that the said hereditaments should be held to the use of the said trustees during the life of his son James Oldham, upon trust to permit his said son to receive the rents and profits during his life, with power to work the mines opened or unopened, and to make leases of the said mines, and after the decease of his said son James Oldham, to the use of all or every or such one or more exclusively of the other of the children of the said James Oldham, at such days or times, in such shares, and with such limitations over for the benefit of the other children, and upon such conditions and in such manner, as James Oldham should by deed or will executed as therein mentioned direct or appoint; and in default of and subject to such direction or appointment, to the use of the right heirs of James Oldham forever.

The testator died in September, 1832. He had no other freehold lands in the parish of Pemberton except the six closes purchased from Rigby, and he had purchased no other land from Rigby except those six closes.

James Oldham made his will, dated the 10th of February, 1838, which contained the following clauses:—

“Whereas by the last will and testament of my father, Thomas Oldham, bearing date the 23d of May, 1832, he devised to the trustees therein named, their heirs and assigns, all his freehold estate and property in the parish of Pemberton, near Wigan, in the county palatine of Lancaster, 438] and all that part of Rigby’s *estate purchased by him, situate as aforesaid, together with the timber growing thereon and all coal or other mines and appurtenances thereunto belonging or being upon or under the same, and also the three cottages left to him by his grandfather, situate in a place called ‘Nook,’ or ‘Lamberhead Green,’ in the parish of Orrell, near Wigan, aforesaid, with their appurtenances, to the use of them the said trustees and their heirs,” &c.

The will then recited the limitations in the will of Thomas Oldham, and the power of appointment, and proceeded as follows:—

“Now, pursuant to and by force and virtue and in execution of the power and authority to me by the hereinbefore recited will given as aforesaid, and of any other power or authority in anywise me enabling in this behalf, I do by my last will and testament in writing by me signed and published in the presence, &c., direct and appoint that all that part and parts of the property comprised in and devised by the hereinbefore recited will of my late father as is and are therein described as that part of Rigby’s estate purchased

by my said father, situate as aforesaid, consisting of Limekiln Meadow, Kitchen Pasture, Fingerpost Meadow, and Middle Meadow, with the timber growing thereon, but not including any coal or other mines and appurtenances relating to such mines belonging or being upon or under the same which are hereinafter otherwise appointed or devised; and also the three freehold cottages left to my said father by his grandfather, situate, lying, and being in a place called 'Nook,' or 'Lamberhead Green,' in the parish of Orrell, near Wigan, aforesaid, with their and any of their rights, members, and appurtenances, shall from and immediately after my decease go, remain, and be to the use and behoof of my sons Thomas and James, their heirs and assigns for ever, to be used and enjoyed by them equally share and share alike as tenants in common and not as joint tenants, as and for their respective portions and shares thereof. And as to the coal and other mines and appurtenances thereto belonging or being upon or under the said lands so heretofore appointed and devised to and between my sons Thomas and James in manner aforesaid, I do hereby direct, limit, and appoint that from and immediately after my decease the same shall go, remain, and be to the use of all and every my other remaining children or child, that is to say, *all my children except and exclusive of my sons [439 Thomas and James, for whom I have hereinbefore made provision, who shall be living at my decease, or born in due time after, equally to be divided between them as tenants in common, if more than one, and the heirs and assigns of such children and child respectively." And the testator gave the residue of his real and personal estate to which he was entitled, or which he had power to appoint or devise, to his wife Ann, her heirs, executors, administrators, and assigns.

The testator, James Oldham, died on the 6th of May, 1838, leaving his said son, Thomas Oldham, his heir-at-law. Besides his two sons, Thomas and James, the testator left six children.

The persons claiming under the six children contracted to sell the coal mines under the whole of the six closes at Pemberton to Thomas B. H. Blundell, but a question having arisen whether the two closes called Great Pasture Field and Billing's Meadow, and the coals under them, passed under the appointment, this special case was filed, to which the persons claiming under the six children other than Thomas and James were plaintiffs, and the purchaser and the persons claiming under the heir-at-law of James Oldham, who

were entitled to the closes in default of appointment, were defendants. The question submitted for the opinion of the court was, whether the appointment of coal and other mines which was made by the will or testamentary appointment of James Oldham, dated the 10th of February, 1838, to his children exclusive of Thomas and James, did or did not comprise the coal and other mines in and under the two closes, Great Pasture Field and Billing's Meadow.

The case was heard before the Master of the Rolls on the 3d of August, 1876.

Bovill, Q.C., *Chitty*, Q.C., and *Chapman Barber*, for the plaintiffs.

Joshua Williams, Q.C., *A. Brown*, and *J. B. Herbert*, for the defendants.

JESSEL, M.R.: The point I have to decide is simply this, 440] whether the description *contained in this will is a description of what the testator had to devise or of a part of it. First of all, we must recollect this: he recites the will of his father, and only recites there that he had "devised all his freehold estate and property in the parish of Pemberton, near Wigan, in the county palatine of Lancaster, and all that part of Rigby's estate purchased by him situate as aforesaid," which I am told, and I assume for the purpose of my decision, is the same estate; that is, that the testator's property in the parish of Pemberton, near Wigan, was that part of Rigby's estate purchased by him. I also assume that he had no other property as part of Rigby's estate except the six closes in question. A conveyance has been produced showing that he bought them, and I assume he had no other, so that that whole property in the parish of Pemberton, near Wigan, and the whole of that part of Rigby's estate purchased by the testator, consisted of six closes.

It is then to be noticed that there are three freehold cottages, all subject to the same power, and the testator recites the power extending to the will, and then, pursuant to and by force of the power (which was a power enabling him to appoint among his children, and in default gave a contingent estate to the right heirs), he proceeds to appoint. Now, he is going to exercise that power, and *prima facie* he is going to appoint the whole of the property. Why should he recite that property is subject to the power, if he is not going to appoint it? It is, therefore, most probable, as he recites that that is the property subject to the power, that he is going to appoint it. He then appoints "all that part and parts of the property comprised in and devised by the

hereinbefore recited will of my late father as is and are therein described as"—what?—"that part of Rigby's estate purchased by my said father, situate as aforesaid, consisting of"—then he names the four meadows—"but not including any coal or other mines and appurtenances relating to such mines belonging or being upon or under the same which are hereinafter otherwise appointed or devised; and also the three freehold cottages to go to the use of his sons Thomas and James."

What is the meaning of that? Is it "that part of Rigby's estate purchased by my father, and then consisting of" so and so, as added by the testator, or is it described as that part of Rigby's *estate consisting of so and so? [44] When we turn to the will, if that is the test, we find it is not so described in the will, for in the will it is, "consisting of six closes." Therefore it does not refer to the will, nor does it refer to the recital in the will, for the recital in the will is only "that part of Rigby's estate," consequently the natural and proper meaning of the words is a gift of the part of Rigby's estate purchased by my father as aforesaid, the words "consisting of" being added by the testator. There the question is, which is the leading description? The gift is of that part purchased by the father, and the "consisting of" is not an accurate description of what it consists. Indeed the same remark would have been made if it had been a recital. It appears to me the leading description is, "that part of Rigby's estate purchased by the father." It is a question on which very little can be said, for, as I said before, it is rather the impression of the judge on reading the words knowing the facts than anything else, the principle of law being to construe the words, having regard, as far as you can, to the whole of the facts.

From this decision the defendants appealed. The appeal came on to be heard on the 6th of March, 1877.

Joshua Williams, Q.C., and *Davey* Q.C. (*A. Brown* and *J. B. Herbert* with them), for the appellants: We contend that the two closes which were omitted by James Oldham did not pass under the appointment, but went to the appellants in default of appointment. The omission of those two closes cannot be regarded as a mere *falsa demonstratio* which may be neglected. In the first place, there is a subject, namely, the four closes specially mentioned, to which every part of the description is accurately applicable. In the second place, there is no designation of the whole *corpus* independently of the description. In either of those cases

the courts never regard a description as a mere *falsa demonstratio*, for the law will not unnecessarily presume an error: *Cunningham v. Butler* (¹); *Hardwick v. Hardwick* (²); *Roe 442* v. *Vernon* (³); *Doe v. Earl of Jersey* (⁴). As to *the inconvenience which may arise from the division of the estate, and the minerals under the various closes, the court has no concern with that; it can only interpret the will according to the ordinary rules of construction.

Bovill, Q.C., and *Chitty*, Q.C. (*Chapman Barber* with them), for the plaintiffs: There is in the appointment a clear and sufficient description of the property independently of the enumeration of the closes. The appointment is of "all that part of the property devised by the will of my late father, as is therein described as that part of Rigby's estate purchased by my said father, situate as aforesaid." That is a sufficient designation of the estate, and then follows an enumeration of the closes, which is defective. It may therefore be rejected: *Webber v. Stanley* (⁵); *Stanley v. Stanley* (⁶); *West v. Lawday* (⁷). The testator recites the power with the description of the whole estate, and professes to exercise the power; it is very unlikely that he intended only to exercise it as to part. His evident intention was to give the whole surface to his two sons Thomas and James, and the minerals under the estate to his other children. The construction contended for by the appellants would make a most inconvenient division of the estate.

Joshua Williams, in reply.

March 23. JAMES, L.J., delivered the judgment of the Court (James, Mellish, and Baggallay, L.JJ.) as follows:

This appeal raises, under somewhat novel circumstances, a question as to the applicability of the maxim, *Falsa demonstratio non nocet cum de corpore constat*. The testator was, under his father's will, equitable tenant for life of, with a power of appointment over, a small estate in the parish of Pemberton, in Lancashire. The legal reversion in fee in default of appointment was given to the son's right heirs. It consisted of six closes of land, forming one compact 448] whole, and of three cottages. The six closes *had been purchased by the father, the three cottages were a small ancestral property. By the will in question the testator made the following appointment, the whole of which

(¹) 3 Giff., 87.

(²) Law Rep., 16 Eq., 168; 6 Eng. R., 695.

(³) 5 East, 51.

(⁴) 1 B. & A., 550.

(⁵) 16 C. B. (N.S.), 698.

(⁶) 2 J. & H., 491.

(⁷) 11 H. L. C., 375.

it is necessary to read. [His Lordship read the clause in James Oldham's will, set forth above, and continued:]

Thomas was the eldest son and heir-at-law. Two closes, being a third of the whole, are left out in the enumeration. They lie in the very centre of the property, and completely separate two of the named closes from the other two. The Master of the Rolls was of opinion that the two omitted closes did, notwithstanding such omission, pass by the devise. Hence this appeal. The counsel for the appellants contends that there is no room in this will for saying that there is any *falsa demonstratio* at all, and that the whole constitutes one entire description of the subject-matter of the devise, every part of which is true, and can be predicated of the four closes, and the four closes only. He says the appointment is an appointment of land which had been purchased by the testator's father, and had been devised by his will—which is strictly true as to the four closes—and which did consist of the four named closes—which is true only of such four. But that is not the form of the appointment. The appointment is of that which had been devised by and described in the father's will by a particular description. And the question is, what is the thing so devised by and described in the father's will? *Prima facie*, the whole description, including the enumeration of the particular closes, would appear to have been intended to be a transcript of the father's will. But the enumeration of closes in the son's will does not accord with the enumeration of closes in the father's will. There is nothing in the father's will described as "consisting of four closes." The contention of the appellants, in fact, is that the son enumerated the four closes only for the purpose of restricting the gift to them—and that enumeration and description are the son's, and not the father's. And the father could not by prophecy have in his will described a subdivision of the property which did not exist in fact or in contemplation until it was made, if made, by his son's will. It is therefore contended by the respondents that the reference to the father's will in the son's devise must stop where the quotation stops, that the *corpus* devised is "that part of *Rigby's estate [444 which had been purchased by the father and devised by and described in his will," and that the enumeration by the son's will is the son's description, inaccurate and insufficient, of the particulars of which that *corpus* consisted, and that it comes strictly and literally within the rule, *Falsa descriptio non nocet cum de corpore constat*.

In considering whether this is or is not a legitimate con-

struction, it will be convenient to look at the father's will. The father's will devises it as follows: [His Lordship read the devise in the will of Thomas Oldham, set forth above, and continued:]

It is admitted that the part of Rigby's estate purchased by the father is exactly identical with the six closes. The words, therefore, in the father's will beginning with "consists of" are a merely additional and superfluous description of that which had been fully and sufficiently described and devised as "all that part of Rigby's estate which I purchased." In the father's contemplation Rigby's estate consisted of two parts, the part which he had purchased and the part he had not purchased; and the whole enumeration of the closes might be struck out of that will without in the slightest degree affecting the devise. In the father's will, then, we have a *corpus* well and sufficiently designated, followed by a description which in that case happens to be accurate and full.

Then the son's will begins with a recital of the father's will, and in that recital the first description and designation only are given. Therefore we have an entire property distinguished and known by the father as "all that part," &c. We have the same entire property known to and distinguished by the son "as all that part," &c. And then we have in the operative part of the son's will an appointment of that which had been described and devised by that designation. In the father's will we have a gift of a thing followed by a *vera descriptio*, in the son's will we have a gift of the same thing followed by a *falsa descriptio*. In the father's will, and in the first mention of it in the son's will, it is true we have the words "all that"; in the operative part of the son's will, it is "that" without the whole. But the omission of the "all" is immaterial. The son says it is described as "that part": it is described as "all that part," which is the same thing. That being so, we really have the 445] very case of a gift of *an entire thing followed by an insufficient enumeration of the particulars of which that entirety consists, a *falsa descriptio quæ non nocet*.

It is suggested that it is not to be imputed to the testator that he made a blundering omission of the two closes. But the very existence of the rule is based on the fact that people or people's scribes do constantly blunder in their description and enumeration of the particulars of their property.

It may be, however, that the context and surrounding circumstances would show that what happens to be a blun-

dering enumeration of particulars was a designed limitation of the gift itself. But how do the facts stand as to that? No doubt the omission of two out of six parcels, a third of the whole, is not easily accounted for except as a slip in copying, and the hypothesis of a slip in copying is rather excluded by the fact that the order of the four parcels in the son's will is not the same as the order of the same four in the father's will. On the other hand, it is in the highest degree improbable that the testator should have intended to die without making an appointment of the two centre closes in his property, splitting up the small estate in the most inconvenient way conceivable—that he should have appointed the four closes to his two eldest sons “as and for their share” in his property while he was leaving the two middle closes to descend to the eldest in addition. It is said, indeed, that he might have thought that the two omitted closes would pass under the residuary devise to his widow. But that he really intended that the two closes should so pass is an extravagant supposition. And there is the crowning absurdity—absolutely incredible—that, leaving the minerals as a provision for the younger children, he should divide such minerals into three distinct portions, the centre portion cutting off all communication with the other two, and so rendering the whole practically unworkable or nearly so. If the appellants' contentions were right, we should have this small property thus divided: Two closes belonging to the two eldest sons as tenants in common, with the minerals belonging to the younger children; then two closes with the minerals belonging to the eldest son alone; then two other closes belonging to the two eldest, and the minerals belonging to the younger children. These considerations of course would *not have availed if, on the [446 plain construction of the words of the will, the gift expressed was only of the four closes. But they do add overpowering weight to the other reasons for deducing from the words the other construction.

In our judgment the decree of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

His Lordship added that the two cases of *Cambridge v. Rous* (1) and *Enohin v. Wylie* (2) appeared to show the limits of the two classes of cases. In *Cambridge v. Rous* the words were, “I give and bequeath all the rest and residue of my property and effects, whether in money or in the public funds or other securities of any sort or kind whatsoever, to be divided equally,” and there it was held a

(1) 8 Ves., 12.

(2) 10 H. L. C., 1.

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common residuary bequest, with a defective enumeration of particulars.

In *Enohin v. Wylie* the words are, "The money proceeds of all the above" (meaning the sale of certain real estates), "as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided in ten equal parts." And there it was held not to be a general residuary bequest.

Solicitors for plaintiffs: *Merediths, Roberts & Mills.*

Solicitors for defendants: *Gregory, Rowcliffes & Co.,*
agents for Taylor & Rowbottom, Wigan.

[6 Chancery Division, 447.]

V.C.M., April 14, 21: C.A., July 11, 1877.

447] **In re MARIA ANNA AND STEINBANK COAL AND COKE COMPANY.*

McKEWAN'S CASE.

Limited Company—Agreement in Articles that Shareholders shall contribute to certain Debts—Insolvent Shareholders—Interest.

A company was formed under the act of 1856, with a capital of £160,000 divided into £10 shares, and the memorandum stated that the liability of the shareholders was limited. The articles provided that certain debts of specified amount which had been incurred by six of the shareholders in forming the company should be paid by the company, and that if the company should not have sufficient funds to pay them, each shareholder for the time being should contribute and pay to the company a proportionate amount of those debts according to the number of shares of each shareholder. The shares were not all allotted. The company having been ordered to be wound up:

Held, by Malins, V.C.: 1. That the agreement to contribute to these debts was legal, and could be enforced by a call, though the shares had been fully paid up. 2. That each shareholder must contribute a sum bearing to the whole of the debts the same proportion as the number of his shares bore to the whole number actually allotted. 3. That if any of the shareholders were insolvent, the solvent shareholders must contribute *pro rata* the amounts which the insolvent shareholders failed to pay. 4. That the six shareholders were not entitled to interest upon large sums which they had paid for interest on the debts.

Held, on appeal, that the decision of the Vice-Chancellor as to points 1, 2, and 4, ought to be affirmed; but that no shareholder was liable to pay any further proportion in consequence of the inability of any other shareholder to pay his proportion.

THE Maria Anna and Steinbank Coal and Coke Company was formed under the Companies Act, 1856. The memorandum stated that the capital was £160,000, divided into 16,000 shares of £10 each, and that "the liability of the shareholders is limited."

By the articles the company adopted two debts of £20,000 and £10,000 therein stated to have been incurred in purchasing part of the property on which the company was to

carry on business, and for which six members of the company had given joint and several promissory notes. The 5th article was as follows:—

“If the parties who have signed the above-mentioned notes for the said sums of £20,000 and £10,000, or any of them, or the *said company, shall be called upon to [448 pay the same principal sums or either of them, or the interest for the same respectively, and the said company shall not have in hand funds of the said company applicable to the payment thereof of sufficient amount, then and in such case each and every shareholder in the company for the time being shall contribute and pay to the company as a debt due to the company a proportionate amount of the sum or sums which the company shall be so called upon to pay according to the number of shares held by each shareholder.” On the 23d of July, 1873, an order was made for winding up the company, and it was found that the assets of the company, after all the shares taken had been fully paid up, were not sufficient to discharge the £20,000 and £10,000 as well as the other debts. On the 21st of November, 1874, Vice-Chancellor Malins decided that a holder of fully paid-up shares was liable to be placed on the list of contributories by reason of his liability to contribute towards payment of the above two debts. *Maxwell's Case* (1), where some further clauses of the articles will be found.

Of the 16,000 shares in the company only 12,706 had been issued. McKewan was a holder of 258 shares fully paid up, and in January, 1875, he was settled on the list of contributories.

Advertisements were issued for claimants in respect of the debts of £20,000 and £10,000, and claims were carried in and allowed to the following amounts—£15,000 principal, and £12,929 1s. 10d. paid for interest on the £15,000 by the persons who had signed the promissory notes. The same persons also carried in a claim to the amount of £4,744 19s. 9d. for interest upon the sums so paid by them for interest. On the 16th of December, 1876, an order was made in chambers allowing this last claim, and on the 29th of January, 1877, an order was made for a call calculated on the above footing.

McKewan moved before Vice-Chancellor Malins, on the 14th of April, 1877, that his name might be removed from the list of contributories, or that in the alternative the order of the 16th of December, 1876, might be discharged and the

(1) Law Rep., 20 Eq., 585.

449] order for a call *varied. Several other shareholders similarly circumstanced gave similar notices of motion.

J. Pearson, Q.C., and Burton Buckley, for McKewan: It has been decided in *Maxwell's Case*(¹) that the holders of fully paid-up shares are liable to contribute to the payment of the debt of £30,000, but it is submitted that such liability is limited to the amount of each share, and that McKewan, who is the holder of 258, can only be called upon to pay £10 per share; but if his liability extends to any further sum which may be required beyond the £10, then it must be limited to such proportion as his 258 bears to the whole number of shares issued, which was 12,706. At all events, he cannot be called upon to pay more than his relative proportion in consequence of some of the shareholders being unable to pay their quota of the amount. The proportion is expressly limited by the 5th article of association to the number of shares held by each shareholder. They also cited *Sewell's Case*(²) and *In re Stuart's Trusts*(³).

Robinson, Q.C., and Northmore Lawrence, for other shareholders in the same interest.

Cotton, Q.C., and North, for the official liquidator: The shareholders in this company have contracted by their articles of association to indemnify the directors, who guaranteed the repayment of the money advanced for the benefit of the company. The case is, therefore, precisely the same as if it had been a company with liability limited to the extent of £30,000 beyond the amount of the shares. The rule of law in such cases is that those shareholders who can pay must contribute the money which cannot be obtained from insolvent shareholders, and the limitation provided by the articles is, to the amount of shares held by each individual; consequently the solvent shareholders must pay for those who are insolvent in the proportion of the shares held by each. The law is settled by the cases of *In re Professional Assurance Company*(⁴), *McInroy v. Hargrove*(⁵), 450] **Robinson's Executors' Case*(⁶), and the cases cited in *Lindley on Partnership*(⁷).

J. Pearson, in reply.

MALINS, V.C.: I have had this company before me on several occasions, particularly in *Maxwell's Case*(¹), where I decided that, though the memorandum of association limited the extent of liability as regarded creditors outside the

(¹) Law Rep., 20 Eq., 585.

(²) Law Rep., 3 Ch., 131.

(³) 4 Ch. D., 213.

(⁴) Law Rep., 3 Eq., 688; Ibid, 3 Ch., 167.

(⁵) 16 L. T. (N.S.), 509.

(⁶) 6 D. M. & G., 572.

(⁷) 3d ed., p. 790.

company, there was nothing in the act of 1856 preventing the shareholders from contracting *inter se* to make themselves liable to a greater amount; that the provision in the articles of association constituted such a contract; and consequently that holders of fully paid-up shares might be put on the list of contributories for the purpose of having a call made to meet the liability so incurred. This is the first case, as far as I recollect, where a limited company have by their articles rendered themselves liable to pay a larger sum than the nominal amount of their shares. My decision in *Maxwell's Case* has not been appealed, and is therefore acquiesced in, namely, that there was here, over and above the liability of £10 per share to the outer world, a liability of the shareholders *inter se* to pay this debt of £30,000, or so much of it as the general assets of the company, including all calls to the amount of £10 a share, should be insufficient to pay.

The question I am now called upon to decide is to what extent the shareholders are liable. Mr. Pearson, on behalf of McKewan, contends that if there is a liability—and he does not deny a liability to a certain extent—he is only liable to the debt in the proportion of 258 shares, which is the number held by him, to 12,706, which is the total number of shares issued. This would make the liability amount to about 25s. a share; but if he is to be answerable for those shareholders who cannot pay, then the money to be called up would amount to £3 per share. Now that this debt is a debt of the company, is put beyond doubt by the clauses in the articles of association. The real question turns *upon the 5th clause of the articles, which [45] provides that if the company shall be called upon to pay the amount, and shall not have in their hands sufficient funds for the purpose, then every shareholder in the company for the time being shall contribute and pay to the company, as a debt due to the company, a proportionate amount of the sum or sums which the company shall be so called upon to pay, according to the number of shares held by each shareholder. This, therefore, is a company debt, and there is a contract to pay it; but it is argued that no one can be called upon to pay more than an equal quota of the amount. That, however, is not the law. The law is that where there is a contract by shareholders to pay in proportion to their shares, they must pay whatever the other persons associated with them cannot pay, until the whole amount which the shareholders are liable to pay is exhausted.

That was decided in the case of the *Professional Life Assurance Company* (*). That was a case of an unlimited company, in which every shareholder contracted as between himself and the other shareholders that he should be liable for the debts of the company in proportion to his share and interest for the time being in the funds of the company, and that the directors should pay any debt due from the company to a shareholder in the same manner as if such shareholder were an ordinary creditor of the company. When the company was wound up calls were made to the full amount of the unpaid capital, but the proceeds were insufficient to pay the debts of the company, and it was held that creditors who were also shareholders were entitled to have their debts paid in full by means of a further call on the shareholders, and that if any of the shareholders were unable to pay the call, the deficiency must be made up by the other shareholders. The result, therefore, is that in all cases of unlimited companies there must be a call upon all the shareholders, and if they cannot all pay, and that enough is not produced by means of the contributions of those who can pay, you must go on and make another call upon those who can pay, and so on until the whole is paid, and ultimately, if there is only one solvent shareholder, he may have to pay the whole remaining debt. I had such a case before me *in the winding-up of the South Essex Estuary Company, where all the funds were exhausted, and ultimately the last shareholder who could pay had to pay the whole remaining debts of the company. The same thing happened in the winding-up of the Overend & Gurney Company. There I went through the same process, and when those shareholders who could not pay had been exhausted, then the last who had money was obliged to pay the whole. Therefore, where a company is unlimited, those who can pay must pay for those who cannot. The rule is universal that where persons associated together contract to pay debts in proportion to the shares held by them, so long as the debts remain unpaid every shareholder must contribute his due proportion, and make up the deficiency for those who cannot pay, and all the debts of the company must be paid while there is one shareholder to be found who is capable of paying.

Those being the general principles, what is there to take this case out of the general rule? I have already decided in *Maxwell's Case* (*) that the holders of fully paid up shares might be put on the list of contributories for the purpose of

(*) Law Rep., 3 Eq., 688.

(*) Law Rep., 20 Eq., 585.

having a call made to meet this debt, and McKewan is bound by my decision in that case so long as it stands unrepealed. That was a representative case, and McKewan was a shareholder at the time. Therefore that case is a decision against him. He is a contributory of the company, and is liable to pay the sum borrowed, which was the only means by which the company could be carried on.

That decision in *Maxwell's Case* is applicable to any private partnership or any public partnership, limited or unlimited, where the parties have bound themselves by such a contract as this.

The case of *McInroy v. Hargrove* (') is a strong illustration of this principle. There five persons had joined together to purchase a large quantity of sugar, and it was to be at the risk of all five in the proportion of one-fifth each. In that case it was contended that there was only a liability as to one-fifth, and that two having failed to pay, the other three were only liable for so much as would have been their quota if all five had paid equally, but it was decided on appeal by Lords Justices Cairns and Turner that the solvent partners were bound to bear the loss in equal proportions.

*Now the arguments to-day go to this, that not [453 one of these shareholders can be made to pay more than a proportionate sum per share if that sum would produce the amount of the debt, supposing all the shareholders could pay up the whole of their shares, and consequently that McKewan can only be made liable for a specific sum as his share of the liability upon his 258 shares. But why is he to be protected from payment of the whole sum when he has contracted to be liable for the full payment? The object of the transaction is that, as five or six of the shareholders had contracted a liability to pay a large amount, not for their own interest only, but for the common benefit of the company, they were to be secured against loss if the project was unsuccessful, while if successful they would have a benefit jointly with the other shareholders. They were to be indemnified out of the £10 per share if the scheme had turned out successful, but upon what principle is it that they are not to be indemnified in case some of the shareholders are not able to pay their quota of the liability? There are no circumstances that apply to an unlimited which would not equally apply to a limited company. I read it, therefore, as a contract by every shareholder that he will contribute in proportion to the number of his shares in case all the shareholders are able to pay their proportion, but that the

(') 16 L. T. (N.S.), 509.

clause was never intended to limit the liability except as to the proportion in which each shareholder was to pay, that is, not according to the relative proportion of the shares held by him to the whole number of shares, but according to the proportion of shares held by him relative to the number of shares held by those who are able to pay; so, if there are holders of 5,000 shares who can pay, McKewan will still only contribute with them in the proportion of 258 to 5,000. Therefore the words in Art. 5 are not ineffectual because his liability will always be limited to the number of his shares. Those who can pay must contribute in proportion to their shares any sum which cannot be obtained from those who are unable to pay. Upon these grounds, my opinion clearly is, that the words "according to the number of shares held by each shareholder" have no more effect in limiting the amount of liability than the words "in the proportion of 454] one-fifth" in *McInroy v. Hargrove* (*), *or the words "in proportion to his share and interest in the property of the company" in *In re Professional Life Assurance Company* (*) had the effect of limiting the liability in those cases.

My decision, therefore, is, that McKewan and those who are in his situation will be liable, so long as any portion of the debt remains unpaid, to contribute with those who are able to pay in proportion to the number of shares they held—not in the proportion of 258 to 12,706, but in the proportion of 258 to the number of shares held by those who for the time being are able to pay, and that McKewan, and those in the same position, must go on with their contributions until, by means of calls from time to time, the whole debt is paid.

April 21. The case was now brought on again upon the question as to the £4,744 19s. 9d. for interest upon interest.

J. Pearson, Q.C., and *Burton Buckley*, for McKewan: The makers of the promissory notes can only claim the sums paid by them for interest, but not interest upon the sum paid by them for interest.

[They referred to *Rigby v. Macnamara* (*); *Bell v. Free* (*); *De Haviland v. Boverbank* (*); *De Bernales v. Fuller* (*); *Ex parte Chippendale* (*).]

Northmore Lawrence, for persons in the same interest.

(*) 16 L. T. (N.S.), 509.

(*) Law Rep., 3 Eq., 688; *Ibid*, 3 Ch., 167.

(*) 2 Cox, 50.

(*) Wils. Ch. Ca., 51.

(*) 1 Camp., 50.

(*) 2 Camp., 426.

(*) 4 D. M. & G., 43.

Cotton, Q.C., and *North*, for the official liquidator and three of the persons who signed the promissory notes: The general rule as to the guarantee upon a promissory note is that the surety is entitled to complete indemnity, and he is therefore entitled to interest upon all sums paid by him, whether for principal or interest: *Petre v. Duncombe* (¹); *Hitchman v. Stewart* (²); *Fergus v. Gore* (³).

J. Pearson, in reply.

*MALINS, V.C.: This contract is of a peculiar [455 nature, throwing upon the shareholders a liability to contribute ratably according to the number of their shares towards this debt, over and above the amount of their shares. It is a contract which ought, I think, to be construed strictly in favor of the sureties, and against those who have to pay. They have contracted to pay the principal sum of £30,000 and interest, but I understand that this sum has been reduced to £15,000 by payments already made. If the debt had remained due to the original creditor, the official liquidator would not, as I understand, have claimed more than the £15,000, with simple interest from the time when the money was advanced; but it is said that because the sureties paid part of the debt, and interest upon it, they are now entitled to have interest upon all the money they so paid. In ordinary cases, when a surety is called upon to pay, and has a contract of indemnity from the debtor, it is not unreasonable that there should be a full indemnity, and that the principal debtor should reimburse him all the money he has paid, with interest. Therefore, upon principle, I should dissent from the decision in *Rigby v. Macnamara* (⁴). That case was followed by Sir Thomas Plumer in *Bell v. Free* (⁵), but I do not think the latter decision could be supported at the present day. I am warranted in saying that, because in the case of *Petre v. Duncombe* (¹), at common law, the same question arose, and was decided in a manner completely at variance with *Bell v. Free*. The case of *Bell v. Free* is, I think, a most unreasonable decision, and one which Sir Thomas Plumer could only have come to because Lord Loughborough had decided the same way in *Rigby v. Macnamara*. The whole current of authority from that time has been the other way. Sir Richard Kindersley, in the case of *Hitchman v. Stewart* (²), decided that a surety was entitled, as against his solvent co-sureties, to be repaid their shares of what he had paid, with interest

(¹) 20 L. J. (Ch.), 242.

(²) 3 Drew., 271.

(³) 1 Sch. & Lef., 107.

(⁴) 2 Cox, 50.

(⁵) Wils. Ch. Cas., 51.

(⁶) 20 L. J. (Ch.), 242.

from the time of payment; and *Petre v. Duncombe* also decided that a surety was entitled to recover not only the principal money paid, but interest upon it. The cases of *De Haviland v. Bowerbank* ⁽¹⁾ and *De Bernales v. Fuller* ⁽²⁾, 456] relied upon by *Sir Thomas Plumer in giving judgment in *Bell v. Free* ⁽³⁾, are cases at law only. I take it to be quite clear that in this court, where a surety pays money for his principal, he is entitled to be repaid with interest from the time of payment.

Then why do I come to the conclusion that the rule does not apply to the present case? This is a contract quite out of the ordinary way. It is a contract to bind the shareholders of the company—not the particular persons who signed the deed at the time the contract was entered into, but all the persons who, year after year, might become shareholders; and it being clear that only the original sum with interest could have been recovered by the original creditors, it seems to me that the liability of the shareholders cannot be increased by the accidental circumstance that the original persons who gave the notes and paid the debt refrained for many years from calling upon the shareholders to pay the interest. I must look at the case as if the company had been a successful one and had continued to carry on their business. The sureties had the right as soon as they paid the money to call upon the shareholders to reimburse them, and this they omitted to do. According to their contention a shareholder not a party to the original contract, but coming in afterwards, and thinking that he was only liable to the contract as it existed on the face of the instrument, would find himself liable to pay a much larger sum than £30,000, namely, interest upon the sums which the sureties paid many years before.

Therefore, although the general principle is in favor of the claim to interest so far as it is a case of principal and surety, yet upon the particular terms of this contract I must come to the conclusion that the liability to pay interest upon interest has not been established. Therefore the sureties must simply stand in the place of the original creditors for whatever sums they have paid.

The court being of opinion that the interest mentioned in the second schedule should be disallowed, there will be a reference to chambers to consider what the amount of the call should be.

McKewan and other of the parties who had moved before

(¹) 1 Camp., 50.

(²) 2 Camp., 426.

(³) Wils. Ch. Cas., 51.

Vice-Chancellor Malins appealed from this order, and the claimants in *respect of the £20,000 and £10,000 [457 debts presented a cross appeal to have the interest on interest allowed. The appeal was heard on the 11th of July.

J. Pearson, Q.C., and Burton Buckley, for McKewan and others: We say that the capital is defined by the memorandum of association, which it is not competent to alter by the articles. The capital is to be £160,000, and to make the articles legal the £30,000 must be part of the £160,000, otherwise you have a capital of £190,000, thus making the articles contradict the memorandum. Under the Companies Act, 1856, s. 61, the liability of the shareholders is limited to the amount unpaid on their shares; we say, therefore, that the stipulations as to the £30,000 are illegal. If, however, the shareholders are liable to contribute to this £30,000, each is liable only for his own quota, and is not liable to contribute to the deficiency occasioned by the insolvency of others. *M'Inroy v. Hargrove* (*), and *Robinson's Executors' Case* (*), on which the Vice-Chancellor relied, turn on the general law of partnership, and do not affect the case. The proportion to be paid by each must be in the proportion his number of shares bears to the whole number of shares in the company, whether allotted or not.

North, Q.C., and Bardswell, for the official liquidator, were desired to confine themselves to the questions as to the amount of contribution: The Vice-Chancellor went on two grounds: first, that this clause in the articles is only an application to particular debts of the provisions in the act as to contribution, and must be construed in the same way. If some contributories in a company cannot pay their calls, a larger call has to be made on the others, and so here. Secondly, that every shareholder agrees, both for himself and the others, that this contribution shall be made.

[JAMES, L.J.: If you carry that construction to its consequences, you must hold that each shareholder guarantees the payment of calls by the others.]

**M'Inroy v. Hargrove* (*) is similar. [458

[JESSEL, M.R.: That case did not go on the form of the instrument, but on the fact that the adventure was a partnership adventure.]

In re Professional Life Assurance Company (*) supports the view of the Vice-Chancellor.

JESSEL, M.R.: The first question that we have to decide is whether or not there is any reason why persons of full age and competent understanding, who have entered deliber-

(*) 15 W. R., 777. (°) 6 D. M. & G., 572. (°) Law Rep., 3 Ch., 167.

ately into a contract to pay certain sums of money for valuable consideration, should or should not be held bound by that contract. Of course it is perfectly plain that unless there is some reason of public policy or some statutory enactment which avoids the contract, the contract is binding. It is not alleged that there is any reason of public policy in this case, and accordingly it is a mere question of statutory enactment.

Now, first of all, what is the bargain? These people became shareholders in the company, with the articles and memorandum of association stating that the liability of the shareholders is limited, and then that the nominal capital of the company is £160,000, divided into 16,000 shares of £10 each. Then, by the articles of association, after reciting that there are two debts of £20,000 and £10,000 contracted on behalf of the company, for which six shareholders had given their joint and several promissory notes, it is provided: [His Lordship read the 5th article.]

It is said that this contract is void, because it makes the shareholder liable to more than his £10 per share; in other words, if he has paid his £10 per share and the assets then fall short, there is a covenant that he will pay a certain proportion of those sums of £20,000 and £10,000 if called upon, and it is said the law does not permit such a contract.

Now it is not pretended that the Companies Act, 1856, under which this company was formed, contains any direct avoidance of the contract. It is not said that there is any 459] section which says *in so many words that such a contract is void, but it is said that when we look to the enactments as regards the memorandum of association in the 61st clause of the act, the inference is that it must be void.

Now, first of all, the 5th section of the act provides that the memorandum of association shall contain the following things: the liability of the shareholders, whether it is to be limited or unlimited; the amount of the nominal capital of the proposed company; the number of the shares into which such capital is to be divided; and the amount of each share. It is to be observed that it is not necessary to state in the memorandums what the liability of the shareholders is, but merely whether it is to be limited or unlimited, and that is exactly what has been done in this case. The memorandum, according to what I can state from my long knowledge of memorandum of association to have been the general if not the universal practice, says that the liability of the shareholders is limited, and says no more about limitation. Then, as to the articles of association, the act provides by sect. 10, that when registered they shall bind the company and the

shareholders therein to the same extent as if each shareholder had subscribed his name and affixed his seal thereto, or otherwise duly executed the same; and there were in such articles contained, on the part of himself, his heirs, executors, and administrators, a covenant to conform to all the regulations of such articles, subject to the provisions of the act. Why may not the articles of association explain the limit of liability mentioned in the memorandum of association? The memorandum of association does what is required. It simply states that the liability is limited, and how it is limited may very well appear in the contemporaneous articles of association, and it is there shown that the liability is limited to £10 per share, and a proportion of £30,000. If we construe this section fairly, it does not appear to me to contain anything preventing the extent of the limit from being expressed in the contemporaneous articles of association. It appears to me, therefore, that this argument is insufficient.

The other argument is derived from the 61st section. "In the event of any company being wound up by the court or voluntarily, the existing shareholders shall be liable to contribute to *the assets of the company to an amount [460 sufficient to pay the debts of the company, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company is limited, no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him;]" and the marginal note says, "Liability of present shareholders in respect of debts." The meaning of the clause is that a shareholder shall not, as regards the debts of the company properly so called, and the costs of winding up, be called upon to pay more than the amount there mentioned; but that is as between the shareholders and the creditors of the company. The present is the case of an arrangement *inter se* by the shareholders for indemnifying six of themselves against certain liabilities which they have assumed for the benefit of the company. There do not appear to be in the 61st section of the act any express words bearing upon that liability, and therefore that section does not avoid the contract any more than the other sections to which we have been referred. It is no part of the duty of courts of justice, as I understand their duty, to be astute in finding reasons for avoiding men's contracts which, if not forbidden by statute, are reasonable; on the contrary, it is their duty, by all fair means, to endeavor to support such contracts. On this part of the case, therefore, I think the Vice-Chancellor is wholly right.

The second point raised, but not much insisted upon, was as to the number of shares in respect of which each shareholder was liable to contribute to these sums. The words are, "shall contribute and pay a proportional amount of the sums according to the number of shares held by each shareholder." I am satisfied that that means according to the number of shares held by each shareholder, having regard to the whole number of shares held, and, consequently, as the whole number of shares were not issued, we must take the proportion of the number of shares actually issued; and in this respect also my conclusion is the same as that of the Vice-Chancellor.

The third point is this: It appears that some of the actual shareholders are insolvent and cannot pay their proportions; and the Vice-Chancellor appears to have held that the 461] solvent shareholders *were liable to pay not only what I will call their original proportion, but also a further proportion to make up for the deficiency of the insolvent shareholders. Upon that part of the case I have the misfortune to differ from the Vice-Chancellor. The words are, as it appears to me, plain: that is, that each and every shareholder shall contribute his proportion and no more—that is, the fraction he is to contribute. It is then suggested that the articles of association amount not merely to a covenant that each individual for himself will pay his proportion, but a covenant that all the others shall pay. That might be so, no doubt, but it is not the natural meaning of the articles of association. We have to remember that the 10th section of the act, which I have already read, says that the articles shall be construed as if they contained a covenant by the shareholder on the part of himself, his heirs, executors, and administrators, to conform to all the regulations of the articles, not a covenant that other shareholders shall conform to them. It appears to me, therefore, both from the natural reading of the articles and the interpretation put upon them by the act of Parliament, that you cannot so extend the covenant.

The only other ground urged was this: that there is a general right in the case of all commercial speculations to make persons who agree to contribute for a specific proportion of debts, also contribute such further proportion as shall be required to be made by those who are unable to pay their proportion. Now, I demur to any such general proposition. No doubt in cases of partnership, where the fact of partnership is once established, then, whatever the words used in regulating the contribution *inter se* may be they are

subordinate to the general agreement of partnership that the losses shall be made good; but where you do not establish a contract of partnership you have no guide but the actual words, and you cannot alter the contract upon any notion that it is a mercantile contract or non-mercantile contract. The contract must be interpreted, as it appears to me, according to the ordinary rules of construing contracts, and cannot be enlarged or extended upon any general notion that because the transaction into which the parties have entered was of a commercial or mercantile nature, a bargain to supply the deficiency of the insolvent shareholders *is to be implied in addition to the bargain expressed [462 in the articles.

It appears to me, on this point the appellant ought to succeed.

JAMES and BAGGALLAY, L.JJ., concurred.

North, Q.C., and *Bardswell*, then opened the cross-appeal as to interest, but the court, without calling on the other side, affirmed the decision of the Vice-Chancellor on this point, saying that there was no ground for going beyond the terms of the contract.

Solicitors: *Stevens, Wilkinson & Harries; Field, Roscoe & Co.*

In this country, unless stockholders are expressly made liable in consequence of fraud, or omission to do some act, or become in effect partners, they are not liable to make up for the insolvency of co-stockholders: *Thompson on Liability of Stockholders*, §§ 88, 89; *Baker on Corp.*, 46.

See also *Bank v. Ibbotson*, 5 Hill, 461; *Hastings v. Drew*, 8 N.Y. Weekly Dig., 488, N.Y. Court Appeals; *Helmer v. St. John*, 8 Hun, 166; *Moss v. McCullough*, 7 Barb., 79; *Moss v. Averill*, 10 N.Y., 449; *McCullough v. Moss*, 5 Denio, 567, reversing 5 Hill, 181, and considering other cases; *Belmont v. Coleman*, 21 N.Y., 99-100; *Slee v. Bloom*, 20 Johns., 669; *Peckham v. Smith*, 9 How. Pr. Rep., 436; *Hall v. Sigel*, 18 Abb. Pr. Rep., N.S., 178; *Pfohl v. Simpson*, 74 N.Y., 137; *Griffith v. Mangam*, 78 N.Y., 611; *Mat-*

thies v. Nedig, 73 N.Y., 100; *Hastings v. Drew*, 50 How. Prac., 254; *Weeks v. Love*, 50 N.Y., 568; *Coburn v. Wheelock*, 84 N.Y., 440; *Boynton v. Andrews*, 63 N.Y., 98; *Skinner v. White*, Hopk. Chy., 107; *Penniman v. Briggs*, Id., 300; *Agate v. Sands*, 73 N.Y., 620; *Miller v. White*, 50 N.Y., 137, reversing 59 Barb., 484, 9 Abb. Prac., N.S., 385; *Schenck v. Andrews*, 57 N.Y., 133; *Shillington v. Howland*, 58 N.Y., 371; *Melvin v. Lamar*, 70 Ill., 446; *Chandler v. Keith*, 42 Iowa, 99; *Bacon v. Pomeroy*, 104 Mass., 577; *Terry v. Martin*, 10 S.C., 263; *Chambers v. Lewis*, 28 N.Y., 454; *Demington v. Puleston*, 33 N.Y. Superior Court Rep., 231, affirmed Court Appeals on same opinion, Dec. 9, 1873; S.C., 85 id., 809; *Reed v. Keese*, 37 N.Y. Superior Court Rep., 269.

[6 Chancery Division, 463.]

M.R., Dec. 18, 1876.

463] *KERR V. CORPORATION OF PRESTON.

[1876 K. 83.]

Street—Building beyond Frontage Line—Consent of Local Authority—Penalties—Injunction to restrain Criminal Proceedings—Equity Jurisdiction—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 155, 156, 251, 252, 254.

A court of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an act of Parliament for a breach of its enactments.

A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence.

The plaintiffs, owners of a house and area situate in and fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage but not beyond the limits of the area. After the completion of the alterations the defendants, the local authority, threatened the plaintiffs with summary proceedings before the justices for the recovery of penalties under the Public Health Act, 1875, on the ground that the plaintiffs had set forward their building without the written consent of the defendants under sect. 156 of the act.

The plaintiffs then moved *ex parte* for an injunction to restrain the defendants from taking these proceedings, alleging, 1, that as the alterations had been made over their own property, the defendants, in threatening proceedings, were acting *ultra vires*; 2, that the defendants, having had notice of the plaintiffs' intention to make the alterations, were bound by acquiescence; and 3, that the justices had no jurisdiction, as the defendants had not made their complaint within six months after the alleged offence, as required by sect. 252 of the act.

Motion refused.

Mayor of York v. Pilkington (¹) disapproved of.

Observations on *Lord Auckland v. Westminster Local Board of Works* (²).

THIS was an *ex parte* motion on behalf of the plaintiffs, who were joint owners in fee of a house and area—the latter inclosed by an upright iron railing—situate in and fronting a street in the town of Preston, for an injunction to restrain the town corporation, acting as the local authority, from making or laying any complaint or information under the Public Health Act, 1875, or from taking any proceedings for the recovery of any penalty or otherwise under the said act in respect of an alleged bringing forward of the front of the house.

The facts relied on by the plaintiffs were as follows: In 464] the *year 1875 the plaintiffs proposed to alter the front of their house by throwing out three bay windows to form a shop front, projecting beyond the general street line of frontage, but not beyond the limits of the area in front of the house. The plaintiffs informed the local authority of their intention to make the alterations, and several communications upon the subject passed between the parties, particularly as to the terms upon which the local authority

(¹) 2 Atk., 302.

(²) Law Rep., 7 Ch., 597.

should permit the works to be carried out, but no agreement was come to in the matter. Eventually, on the 18th of October, 1875, the plaintiffs, being advised that they could proceed without the consent of the local authority, commenced the alterations in question, which were completed in the last week in March, 1876. The borough surveyor frequently visited the works during their progress, and no application was made to the plaintiffs on the part of the local authority for the inspection of any plans until December, 1875, when, at the desire of the town clerk, the plaintiffs' solicitor and architect produced to him and the borough surveyor the plans of the alterations. No objection was then made to the plans, but the town clerk informed the plaintiffs' solicitor that he would lay the matter before the local authority for their consideration.

The plaintiffs, however, heard nothing more upon the subject until the 12th of October, 1876, when they were served with a notice by the borough surveyor informing them that in making the alterations they had acted without the written consent of the local authority as required by sect. 156 of the Public Health Act, 1875; and that in default of their immediately setting back their building to its original frontage, the penalties specified by the act would be enforced against them, and the necessary proceedings taken by the local authority for that purpose.

The plaintiffs disputing the right of the local authority to compel them to set back their building, the town clerk on the 12th of December, 1876, informed the plaintiffs' solicitor by letter of his intention to apply to the justices for a summons under the act. The plaintiffs thereupon issued a writ, and now moved for an injunction in the terms above stated (').

(') The Public Health Act, 1875 (38 & 39 Vict. c. 55), provides as follows:

Sect. 155: "When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith.

"The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence

of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this act."

Sect. 156: "It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front wall of the house or building on either side of the same.

"Any person offending against this enactment shall be liable to a penalty

465] **Chitty, Q.C., and Humber, for the motion: Our ground for this application—for which Mayor of York v. Pilkington* (1) is a distinct authority—is that we have equitable defences which could not be satisfactorily urged and considered before a magistrates' tribunal.

In the first place we are building over our own land, and not over land belonging to the corporation. They cannot prohibit us from building over our area, which is private property, without paying us compensation under sect. 155 of the Public Health Act, 1875. Therefore, in threatening these proceedings before the magistrates, they are acting *ultra vires: Lord Auckland v. Westminster Local Board of Works* (2).

Secondly, the corporation are bound by acquiescence, for 466] **although they were well aware of our intention to build, yet they raised no objection until the notice of the 12th of October, that is, after the works had been completed and our expenditure incurred.*

Thirdly, the magistrates have no jurisdiction, for, under sect. 252 of the act, complaint must be made within six months from the time the alleged offence has been committed, whereas upwards of six months elapsed before the corporation raised any objection to our building.

JESSEL, M.R.: I am of opinion that this application ought not to be granted. It is an application of a novel character, though it seems to be not altogether without precedent; in fact it owes its origin to a precedent with which I am not unacquainted.

The object of the action is to restrain a local board from taking proceedings before the magistrates against the plaintiffs by reason of his having advanced his building beyond the line of frontage. The main equity suggested on behalf of the plaintiffs is that the local board knew of their intention before the erection of the building, yet stood by and

not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority."

Sect. 251: All offences and penalties under the act . . . may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction . . . consisting of two or more justices of the peace in petty sessions, &c.

Sect. 252: "Any complaint or information made or laid in pursuance of this act shall be made or laid within six months from the time when the

matter of such complaint or information respectively arose. . . ."

Sect. 254: "Where the application of a penalty under this act is not otherwise provided for, one half thereof shall go to the informer, and the remainder to the local authority of the district in which the offence was committed: Provided, that if the local authority are the informer they shall be entitled to the whole of the penalty recovered. . . ."

(1) 2 Atk., 302.

(2) Law Rep., 7 Ch., 597.

allowed them to incur expense. A second ground of equity is suggested, namely, that the proceedings before the magistrate could only be taken within six months from the time of the alleged offence, and the six months had expired; and a third that the magistrates have no jurisdiction to interfere, except where the building complained of extends beyond the owner's own property.

In the first place, the plaintiffs' last two objections are defences to the proceedings before the magistrates, and nothing else, and I am not going to assume that what may be valid defences will not be given full weight to by the magistrates. I must assume that the Legislature has given the magistrates the power to decide the question according to law, and no one is entitled to say that a judge intrusted by the Legislature with judicial power is incompetent to exercise it.

The first question is whether there is equity to restrain a proceeding of the kind now threatened. It is a criminal proceeding instituted by information in the usual way, and seeking to recover a penalty for a breach of certain laws which are sanctioned by the Legislature.

*Why ought a court of equity to interfere with the [467 ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in *Saull v. Browne* (¹), where I declined to interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in *Mayor of York v. Pilkington* (²).

My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a court of equity has interfered in criminal proceedings. I do not say that the court might not interfere in a possible case, but as a general rule it will not.

Then I come to the question whether there is any equity at all. Now I have been referred to the case of *Lord Auckland v. Westminster Local Board of Works* (³), and speaking with all deference to the eminent judges who decided it, it appears to me that sufficient attention was not paid to the real facts of that case. The Lords Justices dealt with the case as if the Westminster Board of Works had threatened to pull down what they had no right to pull down, and, that, being a wrongful act, they felt no doubt as to their jurisdiction to restrain it. If that had been the case here, I should, without that decision, have granted an injunction,

(¹) Law Rep., 10 Ch., 64; 11 Eng. R., 434.

(²) 2 Atk., 302.

(³) Law Rep., 7 Ch., 597.

just as in the case of a railway company exceeding its powers. But on reading the report, that was not the real state of the case at all. The Westminster Board of Works had not threatened to pull down the houses, but to apply to a magistrate for an order to pull down, and such an order could not have been made except by a magistrate, having jurisdiction to make it; so that the application was really to restrain the board, not from pulling down—as both the Lords Justices treated it—but from applying to a magistrate for an order to pull down. Consequently the judgment in that case has in fact no real application to the present case.

I cannot therefore treat that as a decision upon the question whether a court of equity will restrain an application to a magistrate for an order to pull down; it decided a 468] totally different *point, and I therefore cannot consider it as an authority applicable to the present case. If there is any reason against the application the magistrate will listen to it and refuse to grant the order.

That being so, it seems to me that there is really no authority for an application such as this. The proceeding before the magistrate is a purely criminal one, for the information may be laid by anybody, and there is a special provision giving half the penalty to the informer, but if the local board is the informer it takes the whole penalty.

Then if the plaintiffs have any equity, what is it? They say that the plans were shown to the town clerk and borough surveyor. I will assume even that they were sent to the local board, though it does not appear that they were. Now the act allows the local board to consent to buildings being set forward and so far interfering with the street; but it is only to be with their consent in writing: that is to say, the only power the local board has is to consent in writing. The local board is only a public functionary who can by a consent in writing consent to the owner of a building not conforming to the general law, which requires him to keep his building back to the original line of frontage.

Even if the plaintiffs received no reply from the local board, that could not amount to acquiescence on the part of the board. The only power the board had in the matter was to consent; that consent they were to grant in one particular way; they could not dispense with the requirement of the act, and no power short of an act could allow them to dispense with that requirement. In the common case of acquiescence the man who acquiesces has a right to allow that to be done which he stands by and sees done; but here

the local board had no right to do anything except give a consent in writing, therefore the ordinary doctrine of acquiescence could not apply. The case is simply this, that without waiting until the town clerk and surveyor took any steps after seeing the plans, the plaintiffs proceeded with their building. Acquiescence on the part of the board is out of the question. The application must therefore be refused.

Solicitors: *Norris, Allens & Carter*, agents for W. Banks, Preston.

See 11 Eng. Rep., 502 note; 11 Eng. Rep., 532 note; 16 Eng. Rep., 698 note.

An equitable action will not lie to restrain an action to recover a penalty imposed by statute, on the ground of the invalidity of the statute (as, for instance, a statute regulating places of amusement), at least until its invalidity has been determined in a previous action. Nor can such an action be sustained as a bill of peace, when plaintiff brings it in his own behalf, and not also on behalf of others claiming the same right: *Wallack v. Society*, etc., 67 N. Y., 23.

Nor to restrain a medical society from expelling a member: *Gregg v. Massachusetts*, etc., 111 Mass., 185.

Equity will interfere to restrain very serious and injurious trespasses, which are not mere ousters or temporary trespasses, but which are attended with permanent results: *Eskridge v. Eskridge*, 51 Miss., 522.

A court of equity will not interfere by injunction to prevent a society and its president, organized for the purpose of carrying out a law of the state, and vested by law with power to make arrests for that purpose, from exercising those powers on the ground that the statute is unconstitutional, or on the ground that the society or its president are using their powers oppressively, or exceeding the power conferred on them by the statute, by making arrests in cases not authorized by the statute, especially in a case where the pecuniary ability of the society and its officers is unquestioned. So held where application was made for an injunction to restrain the American Society for the Prevention of Cruelty to Animals (incorporated by an act of the Legislature of this state, passed April 10th,

1866, and the acts amendatory thereof) and its president from making certain arrests threatened to be made by them, for alleged violations by the plaintiffs of the statutes of the state relating to the prevention of cruelty to animals: *Davis v. American*, etc., 6 Daly, 81.

The subject-matter of the jurisdiction of courts of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. It has no jurisdiction in matters merely criminal or immoral, which do not affect any right of property, nor do matters of a political character come within its jurisdiction.

A court of chancery has no jurisdiction to interfere with the public duties of any department of government except under special circumstances, and where necessary for the protection of the rights of property.

Equity will not interfere, by injunction, to restrain persons from exercising the functions of public offices, on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law.

In this case, it was sought to enjoin the city council of a city from enforcing an ordinance on the sole ground that, if the ordinance was enforced, it would deprive the complainants of the functions of offices which they held in the city.

Held, that a court of chancery had no jurisdiction: *Sheridan v. Colvin*, 78 Ills., 233; *Cohen v. Commissioners*, 77 N. C., 2.

A court of equity will not restrain a city and its officers from performing an act which is illegal and unwarranted by law, on the ground that it will

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necessitate a levy of heavy taxes or special assessments, as the party complaining has an ample remedy at law. In such a case, the tax or assessment will be illegal and void, and its payment can be resisted at law: *Brush v. City of Carbondale*, 78 Ills., 74.

The power to hold an election is political and not judicial, and a court of equity has no jurisdiction to restrain officers from the exercise of such powers: *Harris v. Shryock*, 82 Ills., 119, 122, and cases cited.

So, also, a suit will not lie to restrain officers from removing a county seat: *Sanders v. Metcalf*, 1 Tenn. Chy., 419.

Nor to restrain officers from closing a public street: *Chicago v. Wright*, 69 Ills., 318.

Nor to restrain payment of his salary to one claiming to be an officer *de facto*: *Colton v. Price*, 50 Ala., 424.

A court of chancery has no power to restrain, by injunction, a board of canvassers from canvassing the returns of an election, where the law under which the election was held, neither in terms nor by implication, confers such power, and where there are no facts before the court which require it to take judicial cognizance, and hear, adjudicate and decree: *Dickey v. Reed*, 78 Ills., 261.

So a suit will not lie to restrain a court or judge from punishing one for contempt: *Sanders v. Metcalf*, 1 Tenn. Chy., 419.

A court of equity will not restrain, by injunction, a court martial from trying one, subject to its jurisdiction,

where he alleges as the only ground for such injunction, that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted: *Perault v. Rand*, 10 Hun, 222.

A court of equity has no jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a party from an office, and appointing a successor, and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete by *quo warranto* against the successor, or mandamus against the mayor and councilmen: *Delahanty v. Warner*, 75 Ills., 185; *Jones v. Granville*, 77 N. C., 280.

Courts of equity will not interfere to prevent municipal authorities from making illegal uses of their powers, or restrain them from attempted enforcement of unauthorized municipal regulations or ordinances, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence: *Brown v. Trustees, etc.*, 11 Bush (Ky.), 435; *Ewing v. City of St. Louis*, 5 Wall., 413.

An injunction will not lie to restrain the publication of a libel: *Life Association v. Booger*, 3 Mo. App. R., 173.

See, however, *Celluloid, etc. v. Goodyear, etc.*, 13 Blatchf., 875, 385-6.

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SMITH V. EARL OF EGMONT.

[1876 S. 135.]

Vendor and Purchaser—Right of Purchaser to separate Conveyances in Lots—Duty of Vendor to keep Property let and cultivated till Completion—Specific Performance—Making Auctioneer holding Deposit Defendant.

A vendor cannot object to convey to a purchaser in parcels by separate conveyances at one and the same time, if the purchaser requires him to do so and pays him the additional expense he thereby incurs; but *quære*, whether, in the absence of any

stipulation, the vendor cannot object so to convey if the purchaser requires the conveyances to be made at different times.

When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy be determined in the ordinary course by landlord or tenant or on a notice to quit given by the vendor at the request and for the convenience of the purchaser, to relet the farm on a yearly tenancy so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet.

Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought.

On the 1st of June, 1875, the plaintiffs in the first action, the Earl of Egmont and Joseph Tarver, as trustees with power of sale exercisable at the request of the plaintiff M. G. S. Knapp as tenant for life, caused an estate at Shenley, in the county of Bucks, to be put up for sale by auction by the defendants Messrs. Debenham, Tewson & Farmer, auctioneers, under printed particulars and conditions of sale.

The estate was not sold at the auction, but afterwards, on the 8th of July, 1875, an agreement in writing was entered into between the plaintiffs the Earl of Egmont and Tarver (thereinafter called "the vendors") of the first part, the plaintiff Knapp *of the second part, and the defend- [470
ant Augustus Albert Smith (thereinafter called "the purchaser") of the third part, to which a print of the said particulars and conditions was annexed; and it was thereby agreed that the purchaser should purchase, at the price of £68,500, the Shenley estate as specified in the said particulars, and subject to the said conditions of sale so far as they were applicable to a sale by private contract, and to a further stipulation that the purchaser should, upon signing the agreement, pay a deposit of 10 per cent. on his purchase-money to the auctioneers, Messrs. Debenham, Tewson & Farmer. The purchaser's object in buying the estate being to resell it in lots, the agreement contained the following stipulation (clause 6) by way of addition to the 13th condition of sale: "The purchaser shall be at liberty to require the vendors to convey the property to him, or as he shall direct, in such portions and by such separate conveyances as he shall think fit; provided that the purchaser shall bear and pay all additional expense whatever incurred or sustained by the vendors in consequence thereof; and if the vendors or their solicitor shall enter, at the request or on behalf of the purchaser, into any negotiation or communication

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with, or furnish any abstracts, evidence, or information to any sub-purchaser or sub-purchasers from him, the same shall be without prejudice in any way to the vendor's rights and the purchaser's liabilities under this agreement, and shall not be deemed to be a recognition of such sub-purchaser or sub-purchasers, or a waiver or abandonment of any of the vendors' rights under this agreement; and the vendors shall not be required to execute any conveyance of any part of the premises except on payment of the entirety of the purchase-money and all interest, if any, due thereon, and all costs and expenses payable by the purchaser under this agreement or otherwise." The annexed conditions provided (13) that the purchaser should pay the remainder of his purchase-money on the 29th of September, 1875, at the office of the vendors' solicitor, and that upon such payment the vendors would execute a proper assurance of the property to the purchaser; that every such assurance should be prepared by the purchaser and tendered or left by him not less than ten days before the said 29th of September, 1875, at the office aforesaid; (15) that the rents or possessions would be received or retained, *and the outgoings discharged by the vendors or the tenant for life up to the said 29th of September, from which day the outgoings should be discharged and the rents or possession taken by the purchaser; and (16) that if from any cause whatever the purchase should not be completed on the said 29th of September, the purchaser should pay interest on the remainder of his purchase-money until completion. Then followed the usual condition limiting the time for requisitions.

The defendant Smith duly paid the auctioneers the sum of £6,850 by way of deposit, and made no objection to the title within the time limited.

On the 12th of August, 1875, Smith employed Messrs. Debenham to resell the estate by auction in lots, subject to certain conditions of sale which provided that vacant possession should be given to the sub-purchasers on the 25th of March, 1876; but only about half the property was resold.

Shortly after the date of the original contract, the plaintiffs discovered that owing to the lunacy of the surviving trustee of an outstanding portions term, it would be necessary to obtain an order appointing a new trustee together with the usual vesting order, and that consequently the purchase might not be completed by the 29th of September, but to enable the defendant Smith to give possession to his sub-purchasers on the 25th of March, 1876, the plaintiffs at

his request early in September served on the tenants of the farms which had been resold, and which were let on yearly tenancies, notices to quit expiring on the 25th of March.

When the time for completion of the original contract arrived Smith was not ready to pay the balance of his purchase-money, nor had he furnished the plaintiffs' solicitor with the drafts of the several conveyances which he proposed should be executed to him in conformity with the contract.

The necessary vesting order as to the portions term having been obtained in December, 1875, the plaintiffs' solicitor, on the 16th of February, 1876, wrote to Smith's solicitor consenting to completion being postponed until the 8th of April, upon the understanding that the drafts should be sent to him within a week. Smith, however, failed to send the drafts within that time, *and accordingly, on the 15th of [472 March, 1876, the plaintiffs issued their writ in the first action against Smith and Messrs. Debenham, claiming specific performance by Smith of the contract of the 8th of July, 1875, and also payment into court by Messrs. Debenham of the deposit of £6,850 with the interest produced thereby.

On the same day, the 15th of March, the plaintiffs' solicitor wrote to Smith's solicitor that the plaintiff Knapp would at Lady Day, and without reference to the sub-purchasers, relet the farms, in respect of which notices to quit had been given.

Some correspondence then ensued between the plaintiffs' solicitor and Smith, in the course of which, however, Smith made no reference to Knapp's intention to relet; and subsequently, on the 25th of March, Knapp relet the farms then becoming vacant to the existing tenants under agreements for yearly tenancies determinable at the end of the first or any succeeding year on six months' notice in writing.

One of the tenants to whom a farm was so relet was a farmer named Clode.

The drafts of the conveyances were ultimately received by the plaintiffs' solicitor from Smith's solicitor on the 29th of March.

Smith, in his statement of defence, alleged that he had been ready and willing to complete his purchase on the 8th of April, 1876, the day fixed by the plaintiffs' solicitor, and submitted that, under the circumstances, the action was wholly unnecessary and vexatious and in breach of the agreement come to for the completion of his purchase on that day. He further alleged that in consequence of the plaintiffs having relet the farms as aforesaid, his sub-pur-

chasers threatened proceedings against him for damages for non-delivery of possession to them. He also claimed, by way of counter-claim, a declaration that he was entitled to possession of the property as from the 29th of September, 1875; that the plaintiffs were not entitled to be paid any interest on the unpaid purchase-money from the 29th of September, 1875, until delivery to him of possession; that the plaintiffs had no right after the execution of the contract of the 8th of July, 1875, to create any tenancy whatever of any part of the property; and that the plaintiffs were liable for all damage caused to him by reason of the tenancies created by them; and other relief.

473] *The defendants Messrs. Debenham delivered a statement of defence, alleging that the £6,850 deposit was received by them in the ordinary course of their business as auctioneers, and had since been held by them as stakeholders. They, moreover, submitted that they were improperly made parties to the suit, and were not bound to pay interest on the deposit, as they had held the money at call and at their own risk; and they stated their readiness to pay the money into court when required. They subsequently paid the deposit into court, and thereupon an order was made dismissing them from the action on payment of their costs by the plaintiffs, the question by whom such costs should be ultimately borne being reserved till the hearing.

The action now came on for trial together with a cross action by Smith against his vendors and also against Clode for specific performance of the agreement of the 8th of July, 1875; to set aside the tenancies created by the vendors; and to turn Clode out of possession.

Clode claimed, by way of counter-claim, specific performance, if necessary, of the agreement under which his farm was relet to him.

The only points arising in the actions calling for a report were, first, as to the right of a purchaser to require the property purchased by him to be conveyed to him in portions by separate conveyances; secondly, as to the duty of a vendor to relet the property sold if it should become vacant before the completion of the purchase; and thirdly, as to the propriety of making an auctioneer who holds the purchaser's deposit a party to an action for specific performance.

Davey, Q.C., and Chapman Barber for the plaintiffs in the first action, and the defendants, other than Clode, in the

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second: The defendant Smith is clearly in default, and therefore we are entitled to specific performance with costs.

As to our reletting the farms, we acted not only on Smith's implied assent, but also within our strict legal rights, for we were not to be left to the risk of the property remaining untenanted and without proper cultivation, *Phillips v. Silvester* (1), commented *on in Dart's Vendors and [474 Purchasers (2); *Sherwin v. Shakspear* (3).

The auctioneers were, under the circumstances, properly made defendants, and we therefore ask that their costs may be added to ours and paid by Smith.

Chitty, Q.C., and *H. S. Leeson*, for Smith, contended, upon the facts, that the vendors had acted vexatiously in issuing their writ before the 8th of April, 1876, they having consented to postpone completion till that date.

Cookson, Q.C., and *Rigby*, for Clode.

JESSEL, M.R., after stating the agreement of the 8th of July, 1875, and reading clause 6, continued: As I understand that condition, it is no more than the law would require. I take it that in no case can a vendor object to convey the sold property in parcels on receiving the whole purchase-money. Whether he could or could not object to convey it at various times is another matter, but that he could not object to convey on his being paid the additional expense occasioned by his joining in several conveyances instead of one, I am quite clear.

An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct. Whether or not he could be asked to keep his legal estate for a long period, and convey it in portions at various times, is a question perhaps deserving of more consideration. But this condition does not exceed the ordinary law; it gives the vendors the additional expense; it gives them the whole purchase-money, and is not to operate as a waiver or abandonment of any of their rights.

With regard to the auctioneers having been made defendants to the first action, if the plaintiffs are right throughout, I think that, considering the deposit was £8,850, not a mere trifling sum, they were justified in making the auctioneers defendants. No doubt it is not the practice, although it is the law, that you may make the depositor or auctioneer a defendant, because he holds the deposit for both parties, so to speak, and the party ultimately entitled gets the money.

(1) Law Rep., 8 Ch., 173; 4 Eng. Rep., 843.

(2) 5th ed., p. 650.

(3) 5 D. M. & G., 517.

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475] *But the practice, and the proper practice, is not to make the auctioneers defendants when they hold a small deposit. If they are applied to to pay the money into court and they refuse to do so, it is time enough to make them defendants.

As a general rule I should not encourage the practice of making auctioneers defendants when they hold a small sum in their hands. I certainly should not sanction making them defendants if it was merely a trifling sum, or an offer had been made to pay. But I think in this case there is no reason why the strict law should not be followed.

[His Lordship, after further detailing the facts of the case, and expressing his opinion that the vendors had acted kindly and liberally in acceding to the defendant Smith's request to serve the notices to quit, they not being bound to do so, continued :]

Now I have to consider the position in law of a vendor who, having sold estates subject to yearly tenancies which he is not compellable to determine, at the request and for the convenience of the purchaser gives notice to the tenants to leave.

I assume that without any default on either side, but by reason of those accidents to which all human affairs are exposed, it is impossible to complete on the day originally named, and that a vendor is informed and knows before the day arrives that it will be so impossible, and that consequently the farms will become vacant on the quarter day before the completion of the purchase. What is his legal position? I think it is his duty, as he has given the notices at the request of the purchaser, which he was not compelled to do, at least before reletting the farms to consult the purchaser to know if he wished them relet, and he should give him notice that he intends to relet them. That it is his duty and obligation to relet them I have no doubt whatever. He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee. For that I have the decision of the House of Lords in *Shaw v. Foster* (¹), which only re-stated what had been the well-known law of the Court of Chancery for centuries.

As a trustee it is his duty to keep the property in a proper state *of cultivation, reasonable regard being had to incurring a liability on his part. No one can pretend for a moment that a trustee of farms performs his duty

(¹) Law Rep., 5 H. L., 321.

by allowing those farms, situate, perhaps, in one of the finest counties in England, and readily lettable, to remain unlet and run the risk of losing the rent. It cannot be pretended for a moment that a trustee performs his duty who does that, or that a trustee who does that voluntarily and knowingly will not expose himself to a serious liability to the *cestui que trust* who loses his rent.

I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain sufficient rent, and to keep the farms in a good state of cultivation. That, I have no doubt, is the general law. Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.

I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done; because if the purchaser says I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off, it might be a proper thing to allow them to remain unlet.

[His Lordship then came to the conclusion, upon the facts, that with regard to the original action, the defendant Smith had clearly accepted the plaintiffs' title and had been in default throughout, and gave judgment against him for specific performance in the usual form, with costs, the costs of the auctioneers to be added to the plaintiffs', and the whole costs to be paid by the defendant: the plaintiffs to have interest at 5 per cent. from the 29th of September, 1875, until completion, setting off the amount of rents and profits received by them since that date.

As to the cross action, his Lordship considered Clode's title indisputable, and that there was no reason whatever why he should be turned out of possession. He then continued:]

As regards the vendors, in my opinion they acted not only fairly but with great caution and care. If anything has gone wrong as far as Mr. Smith's interests are [477 concerned, he alone is to blame for it, through not taking any notice of Mr. Knapp's expressed intention to relet.

In my opinion his claim is utterly baseless and unfounded, for I cannot see how the vendors could, under the circumstances, assume otherwise than an assent on the part of the

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purchaser to their reletting, even supposing they had not been required by law to relet; and I should have held that they were exonerated by the correspondence from any liability for the reletting, even if my opinion as to the legal position of the parties had been different from what it is.

Therefore the proper order in the second action is to dismiss it with costs, which I do.

Solicitors for plaintiffs: *Iliffe, Russell & Iliffe*, agents for J. Parrott, Stony Stratford.

Solicitor for defendant Smith: *A. R. Oldman*, agent for T. W. Salmon, Diss.

Solicitors for Clode: *Perkins & Weston*.

It is well settled that as against a purchaser, or even a wrongdoer, the party sustaining damages must make reasonable exertions to render the injury as light as possible. And if the injured party, through negligence or wilfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him: *Hamilton v. McPherson*, 28 N. Y., 72.

Georgia: *Driver v. Maxwell*, 56 Geo., 12.

Illinois: *Dobbins v. Daquid*, 75 Ill., 464.

Iowa: *Simpson v. Keokuk*, 34 Iowa, 568; *Beymer v. McBride*, 37 Iowa, 114; *Allender v. C. R.*, etc., 37 Iowa, 264.

Maine: *Miller v. Mariners' Church*, 7 Maine, 55-6.

Massachusetts: *French v. Vining*, 102 Mass., 132.

Mississippi: *New Orleans*, etc., v. Echols, 54 Miss., 264; *V. & M. R. R. Co. v. Rogsdale*, 46 Miss., 458.

New York: *Rexter v. Starin*, 73 N. Y., 601; *Hamilton v. McPherson*, 38 N. Y., 72; *Worth v. Edmonds*, 52 Barb., 40; *Huntington v. Ogdensburgh*, etc., 33 How. Pr., 419-420, and cases cited; *Taylor v. Reed*, 4 Paige, 572.

See also *Richardson v. Northrup*, 66 Barb., 85.

Pennsylvania: *Chamberlain v. Morgan*, 68 Penn. St., 168.

See *R. R. Co. v. Aspell*, 28 Penn. St. R., 147; *Adams' Exp. Co. v. Egberts*, 36 Penn. St. R., 360.

United States, Circuit and District: *Clarke v. Steamer Fashion*, 2 Wall., Jr., 339.

Vermont: See *Hathorn v. Richmond*, 48 Verm., 557.

In an action for breach of an agreement to repair, the lessee's measure of damages is the difference in value of the use of the premises as they are and as the lessee agreed to put them: *Cook v. Soule*, 45 How. Pr., 340, affirmed 56 N. Y., 420; *Cole v. Buckle*, 18 U. C. Com. Pl., 286.

See *Metger v. Kavanaugh*, Irish Rep., 11 C. L., 431; *Dobbins v. Duquid*, 75 Ill., 464; *Eten v. Luyster*, 37 N. Y. Superior Ct. R., 486, 60 N. Y., 252; *Shallies v. Wilcox*, 4 Thompson & Cooke, 591; *Holbrook v. Young*, 108 Mass., 83.

But if the requisite repairs were trifling, and the damages, if they are not made large, it is the duty of the lessee to make the repair and charge the lessor with the expense thereof: *Cook v. Soule*, 45 How. Pr., 340, affirmed 56 N. Y., 420; *Dorwin v. Potter*, 5 Den., 306; *Benard v. Babcock*, 2 Rob., 182; *Ward v. Kelsey*, 42 Barb., 582, affirmed 38 N. Y., 80; *S. C.*, 38 Barb., 269, 18 Abb. Prac., 269; *Walker v. Swayzee*, 3 Abb. Pr., 136, 138.

See *Metger v. Kavanaugh*, Irish R., 11 C. L., 431.

So after notice and neglect he may recover expense of the repairs, though not merely trivial: *Meyers v. Burns*, 33 Barb., 401, 35 N. Y., 269; *Sheary v. Adams*, 18 Hun, 181.

See *Cole v. Buckle*, 18 U. C. Com. Pl., 286.

Though the tenant cannot recover for interruption to his business while the repairs are being made, if properly

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made with due diligence: *Ward v. Kelsey*, 42 Barb., 582, 88 N. Y., 80.

See also *Cole v. Buckle*, 18 U. C. C. Pl., 286; *Metger v. Kavanaugh*, Irish Rep., 11 C. L., 431.

But where the landlord makes the repairs, he is liable to his tenant for all the damages resulting from the same being negligently done: *Walker v. Swayzee*, 3 Abb. Pr., 138; *Walker v. Shoemaker*, 4 Hun, 579.

See *Cram v. Dresser*, 2 Sandf., 120; *Morgan v. Smith*, 5 Hun, 220; *Morgan v. Smith*, 70 N. Y., 537.

The rule that a party aggrieved by a trespass will not be allowed to recover damages resulting from his neglect to employ the obvious and ordinary means of preventing or lessening them, is simply one of good faith and fair dealing; it will not prevent his recovering for such damages as he may have actually suffered, and which could not have been, by reasonable diligence, averted: *Gilbert v. Kennedy*, 22 Mich., 117.

If a person sells, for the purpose of being fed to a cow, part of a lot of hay on which he knows white lead to have been spilt, and the cow dies from the effect of the lead in the hay, he is liable for her loss, although he carefully endeavored to separate and remove the damaged hay, and thought that he had succeeded.

On the trial of an action for causing the death of plaintiff's cow by unwholesome food sold by the defendant, it appeared that a veterinary surgeon lived in the plaintiff's neighborhood, and the defendant requested the judge to rule that if the plaintiff neglected to employ him the plaintiff could not recover; but it did not appear that the plaintiff knew of the surgeon. The judge ruled that, if the plaintiff knew the cow to be in danger of death, the plaintiff was bound to employ the best remedies within reasonable reach, at reasonable trouble and expense; and if the jury were satisfied that such remedies would have been effectual, and the plaintiff did not seek for their use, nor inform the defendant reasonably of the facts, the plaintiff could not recover.

Held, that the defendant had no ground of exception: *French v. Vinig*, 102 Mass., 132.

In a suit for damages, caused by defendant diverting a stream from its channel by constructing a culvert and carrying gravel upon plaintiff's premises in a case where the deposit is comparatively extensive, and the cost of removing it would probably equal, if not greatly exceed, the value of the soil covered by it, the rule contemplates that the material deposited by the flood is to remain upon the land; and one of the items of damage is the depreciation in the value of the land in consequence of its remaining.

The owner of the land is therefore under no obligation to remove the gravel so deposited thereon, by reason of his having received compensation for his damages from the wrongdoer; nor does he incur any peril, in a legal sense, by suffering it to remain.

Hence his neglect to remove such gravel bar will not preclude an action by him for damages done by a subsequent flood, in consequence of the improper and unskillful location and construction of the culvert by the defendants, although such gravel bar may have had some effect in deflecting the course of the flood. The case will be the same, in that respect, as if the flood had been thus diverted by the natural formation of the surface of the plaintiff's land, or as if the bar had been deposited there before the culvert was made: *Easterbrook v. Erie Railway Co.*, 51 Barb., 94.

Where a railroad company, by its trains, killed cattle of the plaintiff which had strayed upon its unfenced track, and they were mangled, bruised and swollen when discovered, it was held that the plaintiff was not required to use diligence to dispose of their dead bodies, to entitle him to recover their full value: *R. R. I. & St. L. R. R. Co. v. Lynch*, 67 Ills., 149.

It is incumbent on an injured party to do whatever he reasonably can to lessen the injury.

In an action against a physician for malpractice to an injured arm, he offered to prove, by a consulting physician, that at an examination by him, "in the presence of and at request of her father, he proposed to put plaintiff under the influence of an anæsthetic, and attempt to reduce it, and that the

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father replied in presence of plaintiff, 'that so long as she was improving so fast as she had done since he came home, he should not have it disturbed,'

and that the injury could then have been reduced." Held, that the offer was properly rejected: *Chamberlin v. Morgan*, 68 Penn. St. R., 168.

[6 Chancery Division, 491.]

M.R., March 26, 1877.

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*KELLAND V. FULFORD.

[1869 K. 32.]

Lands Clauses Act, 1845, s. 69—Railway Company—Purchase of Infant's Real Estate—Purchase-money—Constructive Reconversion into Realty.

Purchase-money paid into court by a railway company under sect. 69 of the Lands Clauses Consolidation Act, 1845, for land of which an infant is absolutely seised in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heir-at-law.

The word "settled" in sect. 69 means simply "standing limited."

THIS was a suit instituted for the administration of the estate of John Kelland, an infant, who died in April, 1868.

In June, 1867, certain real estate of which the infant was 492] seised *in fee to his own use was taken by the Devon and Cornwall Railway Company for the purpose of their undertaking, and in April, 1871, the purchase-money, amounting to £517, was paid into court under sect. 69 of the Lands Clauses Consolidation Act, 1845, and invested in £569 consols on the credit of the cause.

The cause now came on upon further consideration, and the question was whether the fund in court formed part of the infant's real or personal estate.

Chitty, Q.C., and *A. B. Bagnold*, for the plaintiff, the heir-at-law: Purchase-money paid into court under the 69th section of the Lands Clauses Act is to be laid out in the purchase of real estate, and therefore remains impressed with the character of realty: *Re Harrop's Estate* (').

In *Foster v. Foster* (*), a case arising upon the 8th section of the Partition Act, 1868, incorporating sect. 23 of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), your Lordship held—distinguishing your previous decision in *Steed v. Preece* (*)—that the proceeds of sale of an infant's real estate sold under the decree in a partition suit must be treated as realty.

As far as the present question is concerned, sect. 23 of the Settled Estates Act is identical with sect. 69 of the Lands Clauses Act.

[They were then stopped by the court.]

(') 3 Drew., 726.

(*) 1 Ch. D., 588.

(*) Law Rep., 18 Eq., 192.

Bagshawe, Q.C., and *Bevir*, for the next of kin: The point has never yet been decided upon the 69th section of the Lands Clauses Act. *Re Harrop's Estate* was a case upon a local act which differed in terms.

Foster v. Foster is distinguishable, for there the court had to consider the question of conversion as affected by the Settled Estates Act. When you are dealing with a case under the 23d section of that act, there must necessarily be a reconversion of the money into land, in order to keep the various parties entitled under the settlement in the same position as they were before: *you cannot, in fact, [493 deal with the money except by considering it as land. But when you have a case under the 69th section of the Lands Clauses Act, where the person originally entitled to the land was absolute owner, and there is no settlement, there is no reason why the purchase-money should be considered as reconverted into land.

[JESSEL, M.R.: In *Midland Counties Railway v. Oswin* (*) there are certainly *dicta* of Vice-Chancellor Knight Bruce in favor of reconversion, though he does not expressly decide the point.]

Those *dicta* are referred to by Lord Cranworth in *Ex parte Flamank* (*), but he nevertheless held that money paid in under the Lands Clauses Act for land belonging to an imbecile person was payable on his death to his executors as personal estate.

In *re Taylor's Settlement* (*), *In re Stewart* (*), and *In re Horner's Estate* (*), cases in which there was held to be reconversion, all related to settlements, and therefore do not apply to this case. Where there is a settlement there is an obligation to reinvest purchase-money in land from the nature of the limitations; but where you have an original absolute interest, as in the case of this infant, there is no such obligation imposed either on the court or on the guardian of the infant.

The rule that money directed to be laid out in land shall be considered as land, applies only where the quality of land is imperatively fixed on the money: *Walker v. Denne* (*). Here, there being no settlement, this money is not necessarily impressed with the character of real estate. We submit, therefore, that the fund must be treated as personal estate.

Roxburgh, Q.C., and *Walter Coode*, for the defendant

(1) 1 Coll., 80.

(2) 1 Sim. (N.S.), 260, 268.

(3) 9 Hare, 596.

(4) 1 Sim. & Giff., 32.

(5) 5 De G. & Sm., 483.

(6) 2 Ves., 170.

Fulford, who had been appointed receiver of the infant's real estate.

JESSEL, M.R.: The only singularity about this case is that it raises a question upon the construction of the 69th 494] section of the Lands Clauses *Consolidation Act, on which there has not as yet been any express decision.

The question is whether the 69th section effects what is called a constructive reconversion as regards purchase-money arising from land taken by a railway company and belonging to an infant, and which could not be conveyed except under the provisions of the act.

The question depends entirely upon the construction of the section, and one must therefore consider first to what it applies. Now it applies to purchase-money or compensation in respect of lands taken from, first, a corporation which, not being beneficially entitled, has no power of sale, or which, being under some statutory disability, cannot sell: then a tenant for life or in tail—that is, a tenant in tail incapable of selling, as, for instance, where estates are settled and made inalienable by act of Parliament, and a tenant in tail who is prevented by law from selling, as, for instance, a tenant in special tail after possibility of issue extinct, who for all purposes of alienation is considered merely as a tenant for life: then, again, a married woman seised in her own right or entitled to dower, who cannot sell except with the concurrence of her husband, they being together owners in fee: then a guardian or committee, neither of whom can sell for himself: then a trustee, executor, or administrator, who may have the entire fee simple like a corporation, and yet may not be able to sell. Thus we find that the great majority of the persons here described are persons taking under no settlement and having no settled estate at all in the real sense of the term.

Then the section goes on to direct that the money shall be deposited in the bank, and “shall remain so deposited until the same be applied to some one or more of the following purposes: (that is to say), In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes.”

Now the word “settled” does not mean “in settlement,” in the usual sense of the term, but it means simply “standing limited.” It must mean that or it would not in general 495] apply to the case of *a corporation, or of a married woman seised in her own right, or of a trustee, guardian, or

committee, or in fact to half the cases mentioned in the previous part of the section. Then the section goes on, "or in the purchase of other lands to be conveyed, limited, and settled . . . in the same manner as the lands in respect of which such money shall have been paid stood settled": meaning "stood limited," for the same reason that otherwise it would exclude half the cases previously mentioned. Then the section says the money may also be applied in removing or replacing buildings, thus further showing an intention of placing the persons from whom the lands have been taken as nearly as possible in the same position as they were before. "Or in payment to any party becoming absolutely entitled to such money." That obviously means, "Entitled to his or her own use," as, for instance, where an infant attains twenty-one, or a married woman becomes discoverer; that is to say—reading this 69th section with the 7th section—till the person becomes entitled to the money to his or her own use there is a constructive reconversion, which he or she on becoming so entitled can always stop, but until that event happens the money is to be laid out in lands or buildings to stand limited to the same uses as the lands sold stood limited, and therefore must be considered as land.

I hold, therefore, that there has been a reconversion of this fund; that it is still real estate, and that consequently it belongs to the infant's heir-at-law.

Solicitors: *Guscotte, Wadham & Daw; Coode, Kingdon & Cotton.*

See 9 Eng. Rep., 748 note; 17 Eng. Rep., 614 note.

Lien where contracted to be sold: *Dickinson v. Beyer*, 87 Penn. St. R., 274.

Where an adult owner of real estate dies intestate, after a contract for the sale thereof, his interest in the money realized from the sale is personal estate and goes to the administrators, not to the heirs at law: *Denham v. Cornell*, 67 N. Y., 556, affirming 7 Hun, 624.

Where a testator directs the proceeds of his real estate, if sold, to be divided equally among his children, and one of them dies after the sale of the land, but before it was paid for, his share goes to his personal representative, not to his heirs: *Ritzman v. Ritzman*, 1 Pearson (Penn.), 167.

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for partition, under chapter 2, title 2, of the Code, converts the wife's realty into personalty, to which the husband's marital rights attach. In case of wife's death after confirmation, the husband and his representatives take the proceeds: *Cowden v. Pitts*, 2 Baxter (Tenn.), 59.

Where a railroad was laid out during the lifetime of a deceased person, but no damage was done till after his death, the guardian of his minor children is the proper person to sue for those damages, even though the property be sold after such injury was done: *Mumma v. Harrisburgh*, etc., 1 Pearson (Pa.), 65.

Where the owner of land which has been taken by a railroad company dies after the land has been appraised, but before the appraised value has been paid the title passes to his heirs or

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devisees, together with the right to demand payment, and they alone, and not the executor, can maintain an action for the money; and it makes no difference in such case that in the pro-

ceedings to obtain an appraisal a judgment was entered for the appraised value: *Buckner v. R. R. Co.*, 7 S. C. Rep., 325.

[6 Chancery Division, 496.]

M.R., April 16, 1877.

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*LEACH V. JAY.

[1877 L. 40.]

Real Estate—Descent to Heir—Seisin in Law—Disseisin—Wrongful Possession by Stranger—Will—Dying “seised”—Technical Words—Construction.

R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession, having devised to L. “all real estate (if any) of which she might die seised.”

An action having been brought by L. against the widow's devisees for recovery of possession, the devisees demurred to the statement of claim on the ground that A.'s devise did not pass the property or any right of entry therein to the plaintiff:

Held, that “seised” being a purely technical word must be construed according to its technical meaning; and that as the seisin in law which A. had on R.'s death had been destroyed, and she had not at her death any seisin either in law or in fact, the property did not pass under her devise.

Demurrer allowed, with costs.

DEMURRER. The statement of claim alleged as follows:

Robert Roberts, being at the time of his death seised in fee simple of certain freehold houses at Brighton, died intestate in 1864, leaving Anne Roberts his sole heiress-at law, and thereupon the property descended to and became vested in Anne Roberts as such heiress-at-law, and remained so vested, and she had seisin in law thereof at the time of her death.

Upon the death of Robert Roberts, his widow, Mary Roberts, under color of a pretended will of her husband in her favor, entered into possession of the property and retained possession until her death in 1869, whereupon her devisees, the defendants, entered into and still continued in possession.

Anne Roberts died in 1871, having by her will, dated in 1870, after giving her residuary personal estate to the plaintiff, John Leach, devised as follows: “I also bequeath and devise to him” (the plaintiff) “all real estate (if any) of which I may die seised.”

The defendants having refused to deliver up possession of 497] the *houses to the plaintiff, or to recognize his title thereto as Anne Roberts' devisee, he brought this action,

claiming to have his title established and to recover possession, with other relief.

The several defendants demurred to the statement of claim on the ground that Anne Roberts' devise did not, under the circumstances, pass the property or any right of entry therein to the plaintiff; or, in other words, that Anne Roberts was not "seised" of the property at the time of her death.

Ince, Q.C., and *Borrett*, for one of the demurrers: We submit that the property in question never passed under Anne Roberts' will, for she did not "die seised" of it. The law is that immediately upon the death of an ancestor the heir acquires a possession or seisin in law: but this possession or seisin is only presumptive; for if there be an actual possession or seisin, either by right or by wrong, in any other person, such actual possession or seisin rebuts the presumption of a seisin in the heir, *Watkins on Descents* ('); the heir's seisin at law being, in fact, defeated by the entry of a stranger, *Cr. Dig.* ('); but it seems that if the heir is married at the time of the descent cast, his wife is entitled to dower, though he may have had seisin at law but for a single moment: *Watkins on Descents* ('); *Broughton v. Randall* (').

The word "seised" is a technical word, *Co. Litt.* ('); and the rule in construing wills is that technical words are to be read in a technical sense unless the context contains a clear indication to the contrary: *Hawkins on Wills* (').

[They were then stopped by the court.]

Davey, Q.C., and *H. A. Giffard*, for the plaintiff: The word "seisin," under the present law, has no technical meaning; it means now nothing more than "possession" or "title." If this testatrix had used the word "possessed" instead of "seised" her real estate would undoubtedly have passed: *Hogan v. Jackson* ('); *Monk v. Mawdsley* ('); *Noel v. Hoy* ('); **Thomas v. Phelps* ('); *Pittman v.* [498 *Stevens* ('); *Davenport v. Coltman* ('). The devise of all her "real estate" includes, according to the definition in sect. 1 of the Wills Act (1 Vict. c. 26), any "right or interest" in land. She had such a "right or interest," for she had a right of entry in respect of which she might have brought an action

(') 4th ed., pp. 84, 40, 41.

(') Tit. 1, s. 27.

(') 4th ed., p. 42.

(') Cro. Eliz., 502.

(') § 448, 266 b, note.

(') Page 4.

(') Cowp., 299.

(') 1 Sim., 286, 290.

(') 5 Madd., 38.

(') 4 Russ., 348.

(') 15 East, 505.

(') 12 Sim., 588.

of ejectment, and by sect. 3 of the Wills Act a right of entry is expressly authorized as the subject of a devise. This is real estate which would have passed to her heir in case of intestacy, for under the new law of descent (3 & 4 Will. 4, c. 106, s. 1), actual seisin is unnecessary, there being now no distinction between seisin in law and seisin in fact. Even under the old law seisin and possession were interchangeable terms, for Bracton (¹) defines a freehold as "*civilem et naturalem possessionem seu seisinam*": Co. Litt. (²); Britton (³); Jacob's Law Dictionary, "Seisin."

We submit that the intention of the testatrix was to devise all real estate to which she was any way entitled, and that the word "seised" has not such a technical meaning as to be incapable of passing this property.

[They also mentioned 3 & 4 Will. 4, c. 27, s. 39.]

Chitty, Q.C., and *E. W. Byrne*, *Cookson*, Q.C., and *Hadley*, for the other demurrers.

JESSEL, M.R.: I have to construe this very concise devise: "I also bequeath and devise to him" (meaning the plaintiff John Leach) "all real estate (if any) of which I may die seised." There is no context.

Now what is the rule of law? The rule of law is, no doubt, to ascertain the meaning of the expressions used by the testator—not to speculate or guess what the meaning may have been. The primary rule of construction, as laid down in *Abbott v. Middleton* (⁴), *Grey v. Pearson* (⁵); *Roddy v. Fitzgerald* (⁶), *Jenkins v. Hughes* (⁷), and other cases, is 499] this—that where there is no context you are to *construe the will according to the ordinary grammatical meaning of the words used. Then there is a subsidiary rule laid down in *Roddy v. Fitzgerald* (⁸), that technical words shall have their legal effect, unless, from the context, it is shown they bear another meaning.

In this particular will the testatrix, for what reason I know not, has used a technical word—a word not only technical, but a word that has no signification in ordinary language at all. It is a purely technical word; and it appears to me that the whole of my duty consists in ascertaining whether she was, at the time of her death, "seised"—according to the technical meaning of that technical term—of this real estate.

The facts as stated in the claim are these: [His Lordship

(¹) ff. 206, 236.

(²) § 448, 266 b, note.

(³) f. 83.

(⁴) 7 H. L. C., 68.

(⁵) 6 H. L. C., 61.

(⁶) 6 H. L. C., 823.

(⁷) 8 H. L. C., 571.

stated them as above.] Therefore the possession has been held adversely to Anne Roberts and her devisee from the time of the death of Robert Roberts. That being so, it is clear, according to law, that the legal seisin—that is, the seisin in law which Anne Roberts had at the time of the death of Robert Roberts, as distinguished from seisin in fact or deed—was destroyed and not restored at the time of her death. She had not then, either in law or in fact, any seisin. As far as this question is concerned it was not real estate of which she died seised, and that being so, whatever I may guess as to her meaning, however odd or capricious I may think such a will may be, I have no means of correcting it, or altering it, but I must decide it upon its literal meaning; and I therefore feel compelled—though, I must say, reluctantly—to allow this demurrer, which I do, with costs.

Solicitors: *Paterson, Snow & Burney*, agents for R. A. White, Grantham; *White, Borrett & Co.*, agents for Taylor & Newborn, Epworth; *T. F. Smallpeice*, agent for Smallpeice & Sons, Guildford.

[6 Chancery Division, 500.]

M.R., July 9, 1877.

*BAYLIS V. TYSSEN-AMHURST.

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[1877. B. 218.

Lammas Lands—Right of Pasture—Common Appurtenant—Prescription—Long Enjoyment—Presumption of Legal Origin—One Commoner suing for himself and others—Pleading—Claim uncertain and unreasonable—Demurrer.

The plaintiffs alleged in their statement of claim that they were owners and occupiers of lands and houses in a parish in which were certain lammas lands, partly freehold and partly copyhold of two manors, and over which the "owners and occupiers of lands and tenements" in the parish had from time immemorial "enjoyed as appurtenant to their respective lands and tenements in the parish a right of pasture for the cattle commonable thereon during the season between the removal of the crops in each year and the time of preparing the land for sowing in the next succeeding year;" that the precise commencement and close of the season were regulated by bye-laws made by the homage of one of the manors, the number of cattle which each owner or occupier was entitled to turn out in respect of his tenement being proportioned to the annual value of the tenement according to a scale fixed by the homage; and that the defendant, the lord of the manor and tenant for life of the lammas lands, had recently inclosed parts of such lands, and had destroyed the pasture thereof, thereby depriving the plaintiffs and such other owners and occupiers as aforesaid of their rights of pasture. The plaintiffs, suing on behalf of themselves and all other owners and occupiers of lands and tenements in the parish, claimed by their action, (1) a declaration that they were entitled, "as appurtenant to their several lands and tenements within the parish, to a right of pasture upon the lammas lands for all their cattle commonable thereon during the season aforesaid, and under such regulations as should from time to time be prescribed;" (2) an injunction re-

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straining the defendant from inclosing any part of the lammas lands, and from destroying the pasture thereon, and otherwise interfering with the exercise by the plaintiffs and such other owners and occupiers as aforesaid of their said rights; and (8) the quieting the plaintiffs and the other persons entitled as aforesaid in the possession of their said rights.

The defendant demurred to the statement of claim on the ground that the prescriptive right thereby claimed was uncertain and unreasonable, and could not be claimed for such a body of persons as that for whom the same was claimed; and that the general right set up by the plaintiffs could not be claimed by prescription.

Demurrer allowed, with costs, but with liberty for the plaintiffs to amend.

In order to make a right of pasture over common or lammas lands appurtenant to 501] particular lands there must be some relation between the *enjoyment of the right and the enjoyment of the particular lands; that is, there must be some connection between the beasts used on those particular lands and the number or description of beasts that may be depastured on the common or lammas lands: as, for instance, where the right claimed is for the beasts which plough the particular lands; or, for every beast used on such lands not exceeding a certain number.

In an action claiming rights of pasture, or rights of a like nature, it is the duty of the court, as far as possible, to attribute a legal origin to such rights, where there is evidence of long continued user, but that duty can only be discharged at the trial.

[6 Chancery Division, 511.]

M.R., July 12, 1877.

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*GRIFFITH V. PAGET.

[1877 G. 75.]

Company—Voluntary Liquidation—Preferred and Deferred Shares—Rights and Interests in Capital—Companies Act, 1862, s. 133.

The articles of association of a limited company whose capital was divided into preferred and deferred shares provided that, subject to the difference in dividing the profits, the preferred and deferred shares should rank equally in the company, and that there should be no difference between a preferred and deferred shareholder in respect to his *status* and liability to the debts and engagements of the company. The articles also provided for the dissolution of the company. On the voluntary winding-up of the company under sect. 133 of the Companies Act, 1862:

Held, that the two classes of shareholders were in the same position, and entitled to the capital *pro rata*.

THIS was the hearing of the action in a case which has already been reported on a motion for an injunction (').

The plaintiff (as stated in the former report) was the holder of thirty preferred shares in the Argentine Tramways Company, Limited, and brought the action, on behalf of himself and all other the holders of preferred shares therein, against the directors and the company, claiming a declaration that a resolution to allot shares in the Anglo-Argentine Tramways Company, Limited, to the deferred shareholders was *ultra vires* and void, and that the whole of such shares ought to be divided amongst the preferred shareholders; and an injunction to restrain the defendants from acting upon certain resolutions of a general meeting of the com-

(') 5 Ch. D., 894; 22 Eng. Rep., 542.

pany so far as the same related to the allotment of such shares to the said deferred shareholders.

The Argentine Tramways Company, Limited, was registered in September, 1871, with the object of acquiring and working certain tramways, and it was provided by the memorandum of association that the capital should be £250,000, divided into 15,000 preferred shares of £10 each, and 10,000 deferred shares of £10 each. Each of the said preferred shares was to be entitled in each year to a preferential dividend at the rate of 12 per cent. *per annum on [512 the amount for the time being paid up on each share, but was not to be entitled to participate further in the profits of the company. The deferred shares were not to be entitled to participate in any year in the profits of the company until the preferential dividend should have been paid up on the preferred shares for the current year and all preceding years; but any deficiency in the preferential dividend in any year was not to be deemed to bear interest. Subject, however, to the payment in manner aforesaid of the preferential dividend, the net profits of the company were to belong to and be divided amongst the holders of the deferred shares in proportion to the number of such shares respectively held by them.

The 17th, 18th, 19th, and 20th articles of association contained the same provisions as to the capital, and as to the two classes of shareholders, that were contained in the memorandum of association. The 21st article provided as follows: "Subject only to the differences above mentioned, the preferred and deferred shares shall rank equally in the company, and, except as aforesaid, there shall be no difference between the *status* and liability to debts and engagements of the company of the holder of a preferred share, and the *status* and liability to such debts and engagements of the holder of a deferred share."

The following articles were also material:—

"146. The dissolution of the company may be determined on for any purpose whatsoever, and whether the object shall be the absolute dissolution of the company, or the reconstitution or modification of the company, or the amalgamation of the company with any other company, or any other object.

"147. The dissolution of the company shall take place whenever it shall be determined on, as provided by these presents, and according to the terms and conditions so determined on.

"148. Provided that no absolute dissolution of the com-

pany (not being a winding-up by a court under statute) shall take place, if at or before the general meeting at which the special resolution to dissolve the company is or is not intended to be confirmed, any of the members or shareholders shall enter into a binding and sufficient contract to purchase, at par or as may be agreed on, the shares and 513] stock of all the members who wish to *retire from the company, and shall make sufficient provision for their indemnity against the liabilities of the company."

The preferred and deferred shares were duly allotted, and were paid up in full, the chief holders of the deferred shares being the directors and their friends.

The directors had, under the circumstances stated in the former report (1), prepared a provisional agreement with a new company, called the Anglo-Argentine Tramways Company, Limited, having a capital of £165,000 in 33,000 shares of £5 each, for the transfer to such company of the whole of the assets of the defendant company, retaining only sufficient cash to pay the dividend for the year ending the 31st of December, 1876. In consideration of this transfer, the new company was to issue to the defendant company as fully paid up the whole of its existing share capital, except seven shares which had been taken by the subscribers to the memorandum of association, and to undertake to discharge all the debts and liabilities of the company. It was proposed that the shares so to be issued should be divided as follows: 30,000 of such shares, representing the nominal amount of £150,000, to be allotted to the holders of the 15,000 preferred shares in the defendant company, in proportion to their respective holdings, and the residue of 2,293 shares, representing the nominal value of £14,965, to be allotted to the holders of the 10,000 deferred shares.

On the 16th of March, 1877, a general meeting of the company was held, at which resolutions were passed for winding up the company voluntarily, and appointing liquidators, and authorizing the liquidators to carry into execution the provisional agreement.

Before the extraordinary general meeting was held for the purpose of confirming these resolutions, the plaintiff brought the present action, and on the 28th of March moved for an injunction to restrain the directors from taking any steps to confirm the said resolutions, and the Master of the Rolls held that sect. 161 of the Companies Act, 1862, only enabled the general meeting to decide on the nature of the consideration to be accepted from the new company, but

(1) 5 Ch. D., 894; 22 Eng. Rep., 542.

not on the mode of its distribution, and directed the motion to await the trial of the action (').

*The action now came on for trial. It appeared that [514 the defendants, with the object of facilitating the proposed arrangement, had acquired with their own moneys all the deferred shares at the price of about 15s. per share. The preferred shares, so far as there was any market for them, were at par or thereabouts, but the profits of the company had hitherto been insufficient to pay more than 7½ per cent. on the preferred shares.

Chitty, Q.C. (*C. H. Turner* with him), for the plaintiff: The 161st section of the Companies Act, 1862, does not authorize directors to wind up a going concern for the purpose of giving effect to an arrangement which will be highly beneficial to themselves, having regard to the relative values of the two classes of shares.

Davey, Q.C., and *O. L. Clare*, for the defendants: The object of the directors was not to benefit the deferred shareholders, but to obtain a quotation on the Stock Exchange. The articles of association contain no provision as to the division of capital upon dissolving the company, and whatever may have been the relative rights of both classes of shareholders with respect to profits, as it is clear that now no more profits can be made, the surplus capital ought to be distributed between both classes of shareholders *pro rata*, without reference to their rights in respect of dividend while the company lasted, according to the 133d section: *In re London India Rubber Company* (*). Under the arrangement the deferred shareholders will get less than they are entitled to, so that it is difficult to see what the preferred shareholders have to complain of.

Chitty, in reply.

JESSEL, M.R.: The question I have to decide is whether, according to the true construction of the act of Parliament and the articles of association, on the voluntary winding-up of a company, the debts being all paid, the assets are distributable among the shareholders in proportion to their shares and capital; or whether, in distributing *the [515 capital and the assets, I am to take into account the dividends drawn by one or more classes of shareholders during the continuance of the company.

I will, first of all, consider it on general principles, as applicable to other partnerships; for, after all, these companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the

(¹) 5 Ch. D., 894; 22 Eng. Rep., 542.

(²) Law Rep., 5 Eq., 519.

same considerations. If in an ordinary commercial partnership one or more of the partners has a larger share of the profits than is the proportion borne by his share of the capital to the capital of the others, whether on account of his services (which is the more frequent ground, in cases of partnership, for giving the larger share), or on account of the services of others formerly given to the partnership, which is sometimes done, especially in the case of a second or third generation, that privilege ceases when the partnership is dissolved. If you give an annuity out of profits to a widow during the continuance of the partnership, she having no share of the capital, of course that, *ex vi termini*, will come to an end at the dissolution of the partnership. If you give a managing partner a salary, or a larger share of profits than his proportion of the capital, of course, at the dissolution, the management comes to an end and his larger share of profits.

But in the ordinary case, when the profits are unequally divided,—that is unequally, as regards the share of capital,—the same rule prevails, and that is quite independently of the circumstance whether the excess of profits is given for services, or given to a sleeping partner for the use of his name or otherwise.

When the partnership comes to an end, the right to the share of profits comes to an end also; and you distribute the assets, after providing for the profits earned up to the time of the dissolution, in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership. Therefore you would distribute the assets simply in proportion to the capital. This is a commercial partnership subject to certain statutory limits. Therefore, if there were no provision to be found anywhere, you would distribute the assets in proportion to the capital, and the mere arrangement for the division of profits *inter se* during the continuance of the partnership [516] would *have no direct bearing on the division of the capital as distinguished from profits earned up to the time of the dissolution after the dissolution of the company.

But this case is governed by an act of Parliament, and the act of Parliament says that the property of the company shall be applied in satisfaction of its liabilities *pari passu*; that is, on winding-up, and subject thereto, the property shall, unless it shall be otherwise provided by the articles of the company, be distributed among the members according to their rights and interests in the company. Therefore the act of Parliament is subject to regulations of the com-

pany; and what it means is, that the regulations of the company are to have effect given to them, if there are any regulations bearing upon the subject. It appears to me, therefore, that there being regulations in this case, I have nothing whatever to do, under the act of Parliament, but to look at those regulations and construe them.

[His Lordship then stated the effect of the 17th, 18th, 19th and 20th articles of association, which embodied the provisions contained in the memorandum of association.]

Now we come to the 21st article: "Subject only to the differences above mentioned" (which is the difference in dividing the profits), "the preferred and deferred shares shall rank equally in the company, and except as aforesaid there shall be no difference between the *status* and liability to the debts and engagements of the company of the holder of a preferred share, and the *status* and liability to such debts and engagements of the holder of a deferred share."

That is very plain English. "*Status*" means the position of the share or shareholder. His rights, and really his liabilities, though liabilities are mentioned also, are the same, subject only to certain rights as to the division of profits, that is, whilst profits are earned; because you find that the dissolution of the company is contemplated by the 146th, 147th, and 148th articles of association. It therefore comes to this, that, under the regulations of this company, as long as profits are earned the profits go to the preferred shareholders until the amount of all arrears is made up, and then the balance to the deferred shareholders. But, with the exception of those provisions as to the division of profits, the *position of all the shareholders is exactly [517 the same. The result, therefore, is, that when a dissolution arrives, and no more profits are earned, all these shareholders stand in exactly the same position, and are entitled to the capital *pro rata*.

Of course some observations were made on the possible hardship of such a result; but the answer is simple. People who enter into these partnerships under articles of association, that is, articles of partnership, must be taken to have read them, and must be taken to have understood them, and if they are to be taken to have read them, and to have understood them, which they ought to do before entering into these contracts, they cannot complain if the contract is afterwards carried out. That appears to me a conclusive answer to any notion of hardship. Whether it is conclusive in fact or not is a matter upon which men who

have experience in the world may have different opinions ; but I must hold it to be conclusive in law.

Therefore I decide that in allotting, as these people have allotted, a small proportion only to the deferred shareholders, which has been done with their consent, they have given them less than they are entitled to, and the plaintiff has no ground of complaint.

Solicitors: *E. Beall; Cunliffe & Beaumont.*

See 12 Eng. Rep., 802 note; Field on Corporations, §§ 120-1; Jones on Railroad Securities, §§ 619-624; Lacey's Digest Railway Dec., 636-7.

As to the rights of preferred stockholders over the common stockholders, see *Kent v. Quicksilver Mining Co.*,

20 Alb. L. J., 333, N. Y. Court Appeals, affirming 17 Hun, 169, 12 Hun, 53; *Chase v. Vanderbilt*, 62 N. Y., 307; *Burt v. Rattle*, 31 Ohio St. R., 116.

See *Main v. Mills*, 6 Bissell, 98.

[6 Chancery Division, 517.]

M.R., July 12, 1877.

WILLIAMS V. JORDAN.

[1876 W. 191.]

Agreement for Lease—Offer and Acceptance—Lessor not named—Specific Performance.

An offer in writing to take a lease of a theatre, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing:

Held, not to be an agreement in writing within the Statute of Frauds so as to entitle the lessor to have the same specifically performed.

On the 29th of February, 1876, the defendants, Robert Jordan, Reuben J. Jordan, and Albert J. Davis, signed the [518] following letter *in the presence of a Mr. Sydenham Watson, who alleged himself to be the agent of the plaintiff, to sell or let the Bijou Theatre in Archer Street, Bayswater, of which the plaintiff was the alleged owner:—

"Sir,—I hereby agree to rent the Bijou Theatre, Bayswater, together with all appurtenances belonging, on a 7, 14 or 21 years lease, to be computed from Lady Day next, and to contain the usual covenants, at an annual rent of seven hundred and fifty pounds (£750), and to sign an ordinary lease. It is understood that I may be allowed to take formal possession of the said premises as soon as this offer is accepted, notwithstanding the lease may not be signed.

"Witness:

"Sydenham J. C. Watson,
"Harlesdon."

"Robert Jordan,
"Reuben J. Jordan,
"Albert J. Davis.

This letter was given to Watson for delivery to the plaintiff.

On the 5th of March, 1876, the defendants received the following letter from Mr. Sydenham Watson:—

“Messrs. R. Jordan, R. J. Jordan, and Albert J. Davis.
“54 Russell Square, W.C.

“Dear Sirs,

“Re Victoria Hall Bijou Theatre, &c.

“I am happy to inform you that your offer of the 29th ult., to rent these premises upon lease of 7, 14 or 21 years, at £750 per annum, is accepted by the owner of the property, whose solicitor will shortly communicate with you regarding the lease. I may mention that I have seen the surveyor and architect, who certifies that the premises are perfectly safe, being most substantially built, and admirably adapted in every way for the purpose required.

“I remain, Dear Sirs,

“Yours truly,

“Sydenham Watson.”

The defendants did not append their signatures to this letter nor to any other document referring to it.

The defendants subsequently refused to perform the contract, alleging that they had withdrawn their offer before the letter of the 5th of March, 1876, was written or sent [519 to them, upon which the plaintiff brought his action for specific performance.

The defendants, by their defence, denied that the letters constituted a contract or agreement within the provisions of the Statute of Frauds.

Roxburgh, Q.C., and *Brett*, for the plaintiff.

Chitty, Q.C., and *Sidney Woolf*, for the defendants: According to Mr. Dart (‘), it appears to be now clearly settled that, in order to satisfy the statute, both parties should be specified either nominally or by a sufficient description. Here the letters do not show who the intended lessor is, and there is no other document which is sufficiently connected with the offer to cure the defect: *Warner v. Willington* (‘); *Boyce v. Green* (‘); *Potter v. Duffield* (‘).

[They referred also to *Rossiter v. Miller* (‘) and *Catling v. King* (‘).]

Roxburgh, in reply: There is an offer to take a lease, signed by the parties to be charged, and an acceptance of

(1) V. & P., 5th ed., p. 217.

(2) 3 Drew., 523.

(3) Batty, 608.

(4) Law Rep., 18 Eq., 4; 9 Eng. R., 664.

(5) 5 Ch. D., 648; 22 Eng. Rep., 382.

(6) 5 Ch. D., 660; 22 Eng. Rep., 392.

that offer by the agent of the plaintiff by the description or reference of the owners. In *Potter v. Duffield* (') your Lordship observed: "The statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed," which is the case here.

JESSEL, M.R.: I must most reluctantly allow the objection, but I think that I am bound to do so. First of all, the letter containing the offer was not addressed to anybody. It begins "Sir," but who "Sir" was does not appear from the letter. It is signed by the defendants, and that is all. There was a letter of acceptance sent to and received by the [520] defendants, but that letter is not signed by *the defendants, nor is it referred to in any subsequent letter or document bearing their signature. Now, as I understand the Statute of Frauds, or rather the decisions on that statute, there must be a memorandum or note in writing of some agreement. But the letter of the 29th of February is not an agreement; it is an offer by the defendants to somebody, I cannot tell who. The letter of acceptance does not show who that somebody is, for there is nothing in it to incorporate it with the original offer, and no document referring to it of subsequent date with the defendants' signature. In the case of *Warner v. Willington* ('), just as in this case, the lessor's name was not signed, and Vice-Chancellor Kindersley held that because the name of the lessor did not appear the memorandum was not sufficient to maintain an action or bill for specific performance. He said: "But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is sufficiently connected with the memorandum by clear reference" (of course he meant some other document previously existing) "that will cure the defect of the memorandum." There is, I have already said, no such document. I am of opinion that I am bound by *Warner v. Willington* to give effect to this objection, and there must be judgment for the defendants, with costs.

Solicitors for plaintiff: *Thomas Beard & Son.*

Solicitor for defendants: *Conrad J. Davis.*

(') Law Rep., 18 Eq., 4, 7; 9 Eng. R., 664, 666.

(*) 3 Drew., 525, 530.

See 2 Eng. Rep., 815 note; 12 Eng. Rep., 217 note; 17 Eng. Rep., 797 note; 22 Eng. Rep., 392 note; 19 Eng. Rep., 698 note; 18 Eng. Rep., 330 note.

No formal language is necessary to be used in a memorandum in writing

of a contract for sale of land. Anything from which the intention of the parties may be gathered will be sufficient to take it out of the statute of frauds.

But the writings, notes or memoranda, such as they may be, must con-

tain, on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear description to render it capable of identification, with terms of sale, and conditions, if any, and price to be paid, or other consideration given : *Wood v. Davis*, 82 Ills., 311 ; *Troup v. Troup*, 87 Penn. St. R., 149.

Upon a sale of whiskey, the parol agreement was that the price should be paid in cash within a month after delivery, or by a bill at four months with bank rate of interest added : Held, in an action for non-delivery of the whiskey, that a memorandum in writing representing the sale as for "net cash," was not sufficient to satisfy the statute of frauds. The parol agreement was for the sale of a quantity of whiskey to be ascertained by a redip ; Held, that a memorandum in writing, representing the sale of an ascertained quantity, was not sufficient to satisfy the statute of frauds : *Mahalen v. Dublin*, etc., Irish Rep., 11 C. L., 88.

Equity will not specifically enforce a contract unless its essential terms, at least by the aid of reference made therein, and of authorized legal presumption, may be clearly and definitely known.

A memorandum of sale of land to two persons described the land merely as the vendor's 40 acres in a specified section, but stated that "both deeds were to-day signed and left with the notary;" that the purchase price was \$2,100 ; that possession was to be given on a day named, and on that day \$1,000 of the price should be paid ; and that the remaining \$1,100 might "stand upon the farm." There was no statement of the rate of interest or the term of credit. Held,

That this language might, perhaps, be construed as requiring the purchasers to pay interest at the legal rate, and to execute a mortgage upon the land for the unpaid purchase-money ; and the deeds deposited in escrow might be resorted to, to ascertain the description of the lands ; but

That the term of credit cannot be supplied by legal presumption ; nor can parol evidence be admitted to supply the defect (*Waterman v. Dutton*, 3 Wisc., 264, distinguished) ; and, for the uncertainty of the contract in that particular, specific performance cannot be

enforced : *Schureling v. Kriesel*, 45 Wisc., 325.

A written bill of sale "of twenty-three casks of wine" imports a sale of the casks as well as of the wine, unless the contrary expressly appears, and parol evidence is inadmissible to show that it was agreed at the time of the sale that the vendee should return the casks : *Caulkins v. Hellman*, 14 Hun, 330.

Where a signed memorandum of sale was not attached to the printed advertisement of sale, nor otherwise referred to it, parol testimony is not admissible for the purpose of connecting them.

A memorandum of a contract of sale, upon which the plaintiff relies in an action for specific performance, must show not only who is the person to be charged, but also who is the bargainor.

If this is done by description, parol evidence is admissible to apply the description, i.e., to show who is the person described.

While parol evidence is not admissible to vary or add to the terms of a written contract in behalf of a party seeking specific performance, it is always admissible in behalf of a defendant resisting it : *Mayer & Morgan v. Adrian*, 77 N. C., 83 ; *Steadman v. Taylor*, Id., 134.

The requirement of the statute of frauds that a contract for the sale of land shall be in writing, etc., applies only to "the party to be charged therewith."

Therefore, where the plaintiff and defendant entered into a *parol* contract whereby the plaintiff agreed that defendant might cut from his land a certain quantity of wood, for which the defendant was to execute to plaintiff a deed for a certain tract of land ; held, that the plaintiff could not recover in an action of assumpsit for the value of the wood taken by defendant, but was bound by the terms of the original contract, the defendant not seeking to avoid the same : *Green v. N. C. R. R. Co.*, 77 N. C., 95.

When the enforcement of a written contract, according to the legal import of its terms, would be fraudulent and wrong, the rule that excludes parol evidence to vary a written contract does not prevail in a court of equity. Defendant sold and delivered stoves to

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the orator, for which the orator paid him a thousand dollars in money, and executed and tendered to him a deed of certain land that defendant agreed to, but would not take in payment of the balance:

Held, that the contract was fulfilled and performed by the orator, and nothing left open for the statute of frauds to operate upon.

In faith of defendant's agreement to take the land as aforesaid, the orator received said stoves and paid the \$1000 therefor, and did various things by way of clearing the land of incumbrances, which otherwise he would not have done, nor have had any motive nor interest in doing:

Held, that the defendant was thereby estopped from asserting the legal effect of a written contract, which provided

generally that the stoves should be "paid for on delivery." *Adams v. Smilie*, 50 Vt., 1.

The rule that the memorandum of the agreement must be complete and show all its terms, does not exclude oral evidence to show that a contract to deliver a phaeton was not to be performed, unless a note delivered as the consideration for the agreement was paid: *Kinney v. Whiton*, 44 Conn., 262.

Whether, in order to take a case out of the statute of frauds, a party can rely upon a written memorandum, which, at the time of the negotiation, he had objected to and refused to accept, quere? *Mahalen v. Dublin*, etc., Irish Rep., 11 C. L., 83.

See 22 Eng. Rep., 392 note; 20 Eng. Rep., 200 note.

[6 Chancery Division, 521.]

M.R., July 13, 1877.

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*HAWLEY V. STEELE.

[1877 H. 273.]

Military Purposes, Land held for—5 & 6 Vict. c. 94—*Defence Acts* (23 & 24 Vict. c. 112; 36 & 37 Vict. c. 72)—*Rifle Practice*—*Action against General in Command of Troops*—*Nuisance*—*Injunction*—*Jurisdiction*—*Parties*.

Semle, where, under the powers of 5 & 6 Vict. c. 94, and the subsequent Defence Acts, land has been vested in the Secretary of State for War upon trust for the Crown, such land, and every part thereof, may be used for all reasonable *bona fide* military purposes that the government may require, and such user cannot be controlled by the court.

In an action to restrain the defendant, a general in Her Majesty's army, and the officers under his command, from causing or permitting rifle practice on a common (forming part of the land thus vested) in close proximity to the plaintiff's house, which, as he alleged, was a serious nuisance and occasioned damage to his property—on motion for injunction:

Held, that to such an action, if sustainable, the Secretary of State for War was a necessary party:

Held, also, that the allegations in the statement of claim being insufficient, no interlocutory injunction could be granted.

THE plaintiff was the resident owner in fee of a dwelling house, garden, and land situate at Ash, in the county of Surrey, and looking upon Ash Common; his statement of claim alleged that Ash Common was a large tract of land belonging to the Crown, and was in the use and occupation of the War Department, and was so used and occupied for divers purposes connected with the troops at Aldershot camp, under the direction and control of the defendant, who

was a lieutenant-general in Her Majesty's army, and in command of the troops at Aldershot.

That in a remote corner of Ash Common, and within 600 yards from the plaintiff's house, there had recently been erected, under the orders and directions of the defendant, a butt, against which had been set up a long row of targets facing the plaintiff's house for the rifle practice of the troops at Aldershot, and the firing parties were stationed between the plaintiff's house and the targets, and at distances of from 100 to 200 yards from the front window; that the firing often commenced before six in the morning, the noise of which was, as the plaintiff alleged, a very serious nuisance and injury to the health and comfort of himself and his *family, and a great injury to his house [522 and grounds, and depreciated the value thereof, and rendered the same much less commodious and convenient as a residence; that the plaintiff had already suffered serious damage, and had remonstrated with the defendant against the continuance of the said nuisance, but he refused to discontinue the same; that the acts complained of were carried on under the orders and directions of the defendant, and with his permission, as the person having the control of Ash Common; that the orders under which the defendant acted as commander of the troops at Aldershot did not instruct him to cause, direct, or permit the troops to fire so as to cause a nuisance, and he had no authority whatever for doing so.

The plaintiff claimed that the defendant and the officers of the army under his orders might be restrained by injunction from causing rifle practice and firing to take place on Ash Common, and from permitting the common to be used for rifle practice and firing, or for the assemblage of crowds or numbers of soldiers so as to be a nuisance to the plaintiff, his family, servants, and premises. The plaintiff also claimed for damages for the nuisance and injury so sustained by himself and his family.

The case now came before the court on a motion on behalf of the plaintiff for an injunction to restrain the alleged wrongful acts of the defendant, and affidavits were filed in support of the plaintiff's allegations, which were uncontradicted by the defendant.

Waller, Q.C., and *Bunting*, for the plaintiff, in support of the motion: The plaintiff's evidence clearly establishes a case of nuisance, which would under ordinary circumstances entitle him to an injunction. But it may be said

that as the land was purchased by the Crown for military purposes, and as the defendant is an officer in command responsible to his superiors, no such action will lie.

Ash Common was purchased under the provisions of the act 5 & 6 Vict. c. 94, which was passed to consolidate and amend the laws relating to the services of the Ordnance Department, and for the vesting and purchase of lands for 523] these services, and for the *defence and security of the realm. By sects. 5 and 6 of that act, lands, buildings, and forts already set apart, or which thereafter should be taken by the Crown for the use of the Ordnance Department, or for the defence and security of the realm, were to be vested in the principal officers of Her Majesty's ordnance, and by the 9th section the said officers are empowered to contract for and take such buildings or lands on behalf of Her Majesty. By the Ordnance Board Transfer Act, 1855, (18 & 19 Vict. c. 117), the powers thus vested in the principal officers of the ordnance were to be transferred to Her Majesty's Secretary of State for the War Department, to whom all lands and buildings held under the former act were also to be transferred. By the Defence Act, 1860 (23 & 24 Vict. c. 112), s. 29, the Secretary of State for the War Department was enabled to avail himself of the provisions of the Lands Clauses Act for the purchase of lands, and Ash Common is now vested in him as trustee for Her Majesty and her successors.

There is, we submit, nothing in any of the acts referred to nor in the Defence Act, 1873 (36 & 37 Vict. c. 72), to authorize anything to be done which would previously have been illegal. These acts only authorized the acquisition of land for military purposes, but no officer can thereby claim any right to commit a nuisance thereon. Nor can the defendant's case be supported by reference to the Military Manœuvres Act, 1872 (35 & 36 Vict. c. 64), for the provisions contained in it as to compensation for damages which are not contained in the Defence Acts, show that special parliamentary powers were necessary to enable military officers to affect private property on which they might trespass. Now, nuisance must be for this purpose on the same footing as trespass, and there is nothing to authorize the constant firing of volleys close to a private residence which, without parliamentary sanction, amounts to a nuisance.

It may be said that as the defendant is an officer of the Queen no action will lie, and that the plaintiff's proper remedy is by a petition of right. But in a case of tort no

petition of right will lie: *Tobin v. The Queen* (*); *Kirk v. The Queen* (*). In *Viscount Canterbury v. Attorney-General* (*) it was held that there could be *no petition of [524 right to recover compensation from the Crown for damage to the property of individuals occasioned by the negligence of servants of the Crown. Again, it may be urged on behalf of the defendant that, assuming the plaintiff is entitled to an injunction, the present defendant is not the proper person to be made defendant as he is subordinate to the Secretary of State for War, but in a case of actionable nuisance the action may be properly brought against the man by whose immediate orders the act complained of was done. In *Nicholson v. Mouncey* (*) it was held that the captain of a sloop of war was not liable for damages in running down a vessel, as the damage appeared to have been done during the watch of the lieutenant, who was upon deck, and who had the actual direction and management of steering and navigating the vessel.

The defendant, as a servant of the Crown, is himself responsible for a wrongful act, though done by the authority of the Crown. This was clearly laid down in *Feather v. The Queen* (*), where Cockburn, L.C.J., observed: "Let it not be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown." If, however, your Lordship should be of opinion that the Secretary of State for War is a necessary party, we ask for leave to amend the writ and statement of claim accordingly. In the meantime we submit that the plaintiff is entitled to an interlocutory injunction. In *Banister v. Bigge* (*) an injunction was granted to prevent the user of a volunteer rifle range until it had been rendered free from danger.

Gorst, Q.C., and *Rigby* (*Sir J. Holker, A.G.*, with them), for the defendant, were not called upon.

JESSEL, M.R.: There are so many reasons why I cannot grant an injunction in this case, that I do not think it necessary now to call upon the *counsel for the defen- [525 dant. When the case comes for trial, if it ever does, it will probably be necessary to hear them. In saying that

(*) 14 C. B. (N.S.), 505.

(*) Law Rep., 14 Eq., 558.

(*) 1 Ph., 306.

(*) 15 East, 384.

(*) 6 B. & S., 257, 296.

(*) 34 Beav., 287.

I am assuming that the statement of claim will be largely amended.

Now, it is rather because I never desire to decide a case on mere technicalities alone, that I shall state some of the points that occur to me as being in the plaintiff's way, many of which are arguable, and give him an opportunity of removing them, so that the real question between himself and the government—for they are the real parties to the suit—may be tried and decided at the trial of the action.

In the first place the plaintiff alleges a case, and his affidavits being uncontradicted, prove a case, which in my opinion would entitle him to an injunction against the defendant, supposing the defendant was the absolute owner in fee simple of the land, and supposing the troops who have caused the noise and vibration which has been occasioned by their firing at the targets were a mob or an assembly of individuals, not subject to military discipline. I take it to be clear that no man is entitled to use his land by allowing others to come upon it and make a noise which is really intolerable to his neighbors, or which, to put it in legal language, materially interferes with their ordinary comfort and use of their dwelling houses; and therefore, if Sir Thomas Steele had been the owner of this land, and if the persons who caused that noise and vibration had not been troops of the government, I should have had no hesitation in granting the injunction. But that would assume also that there had been some trifling amendment made in the statement of claim to which I will refer.

It appears on the statement of claim that Sir T. Steele is not the owner of the land at all, and it also appears upon the evidence that he is merely the lieutenant-general in Her Majesty's army who happens to be in command of the troops at Aldershot. Then there is no allegation of that which is absolutely essential, namely, of a threat to continue the nuisance.

Then it is not stated actually that the Ash Common belongs to the Crown. It appears it does not, and it is vested in the Secretary of State for War under various acts of Parliament as a corporation in trust for the Crown, and the 526] rules which apply *to that case of ownership are not the same as those which apply to the pure ownership of the Crown. You can sue the legal owner when a corporation, although he is a trustee for somebody else, for misuser of the land, and I have no doubt that was one of the reasons why the new corporation was created. He can both sue and be sued. To what extent he can be sued when the direct

rights of the Crown come into question is a point I am not now deciding, but he is a necessary party to the action.

Then I cannot find out from the statement of claim, or from the evidence, that the defendant, Sir T. Steele, had any real control over the land at all. It is not only not alleged that he intended to continue it, but so far as I can find out, he cannot continue it. He only remains in command so long as the Secretary of State or the General Commanding in Chief chooses, and no longer, and any one who happens to be in command may have to do this very same thing. So the person who has done the act is not the person who threatens to continue the act, and even assuming that Sir Thomas Steele could be properly sued for what has been done, he could not be sued for an injunction, because there has been no threat to continue the act, nor does he threaten to continue it in the present case. That is quite a sufficient answer, in my opinion, to this application for an injunction to restrain the defendant and the officers of the army under his orders. If you are asking for an injunction, you must have as the defendant the man who, in future, can authorize or permit the continuance of the nuisance, and he is not here. So far, therefore, upon what I will call technicalities, although I agree there are substantial grounds for an injunction, I am quite unable to accede to the present application.

But there remains behind a very substantial question indeed, and it is whether these are rightful or wrongful acts, whether wrongful in the case of an individual, and rightful in the case of the military authorities. That must depend, as it appears to me at present, although I have not heard the counsel for the defendant upon the construction of the various acts of Parliament which authorized originally the officers of ordnance, but now the Secretary of State for War, to acquire the right to lands.

Under various acts of Parliament the officers of the Ordnance Department and their successor the Secretary of State for War *were authorized to acquire and, as I understand it, to use land in this kingdom for the purpose of securing the military defence of the country, chiefly, no doubt, for the defence of the realm. Then there was the Defence Act, 1860, which authorized the War Department to acquire land for the purpose of fortresses, and for the use of that land for the purpose of fortresses. That, I suppose, would be the meaning of such an act of Parliament. If that is so, you cannot bring an action against anybody who should so use the land which has been authorized to be

acquired, and therefore, if I should be of opinion that the acts of Parliament authorize the officers of the Ordnance Department and their successor the Secretary of State for War to acquire these lands for the purpose of general instruction, and that the use made of them was a reasonable use, it seems to me no action would lie against the individual who, under the authority of the executive government, made such a use of the land. That seems to me the general proposition.

Now, I quite agree that no individual can plead the command of the Crown if he does a wrongful act in the shape of a tort. For instance, if the officer in command at Aldershot told his men, not being sufficiently provisioned, to attack the houses in the neighborhood, and to feed themselves from the larders of the inhabitants, it is quite plain that that order would be no justification to the men, and they would be liable to indictments or other criminal proceedings the same as any other person. The real question is, whether the Legislature has authorized the act to be done. That being so, the acts, to which my attention has been drawn, look very much like authority for that purpose. I am not going finally to decide the question; it is a question that will be very much considered at the trial, when I shall know a good deal more about the acts of Parliament, and also something more (although I do not see that it is disputed) as to the reasonableness of the acts done, having regard to the purpose for which this land has been acquired.

The first act to which I have been referred, the Consolidation Act, relating to the services of the Ordnance Department, the 5 & 6 Vict. c. 94, is not perhaps worded in such a way as to be beyond argument as to the meaning. I think 528] the general meaning *is pretty plain. The 5th section enacts with a great deal of verbiage, that "all messuages, castles, forts, lands, &c., which have been heretofore set apart for the use and service . . . or for military defences, or which have been taken by any person in trust for Her Majesty or her royal predecessors, or her or their heirs or successors, for the use and service of the said departments, or for the defence and security of the realm, either in fee, or for any life or lives, or otherwise howsoever, and all erections and buildings, which now are, or which shall or may hereafter be erected and built thereon, together with the rights, members, easements, and appurtenances to the same respectively belonging, shall be, and become, and continue vested in the principal officers of Her Majesty's ordnance"—now the Secretary of State for War.

Then the 6th section says that the same thing shall apply to land taken in future for the same purpose which is to be vested in the same manner. [His Lordship then referred to sects. 9 and 10.] Putting all these sections together, they seem to me to amount to this, authority to the officers of the departments to take, that is, to purchase or acquire, and to use the land so purchased or acquired, including lands then vested in them, "for the purposes of the defence of the realm"—these are very large words—"or for military defences, or for the services of the departments," substantially for all reasonable military purposes. That is the effect of the sections, as it appears to me, although I am not now intending finally to decide upon them; upon the reading of them I mean. Therefore we have this as the general effect of the acts of Parliament: lands authorized to be bought, vested in a trustee for the Crown, to be used for the military purposes of the realm.

Now, what does that mean? That must mean to be used for reasonable purposes having regard to the nature of the requirements of the military departments of the government; and if that is so, it appears to me that, except in the case of an outrageous departure from all reasonable use, it is not for a court of justice to say what is the reasonable use of land for military requirements, but it is for the departments to say that such land is wanted as a camp for exercise and instruction, such other land is wanted for a fortress, and such other land is wanted for an arsenal. In other words, I think the discretion is vested in the executive government *having authority over military matters to [529] determine for which of these various military purposes for which land may fairly be required the particular land in question is to be appropriated. It is not for the judge to say that they have made a bad selection, and that they ought to have taken Blackacre for a camp instead of a fort, that they ought to have taken Whiteacre for an arsenal instead of a camp, or that they ought to have taken Greenacre for a camp instead of a fortress. It appears to me that that would be an invasion of the authority of the military department by the judge if he interfered with such matters, and therefore, if I find that the military authorities of the country had selected this land as being a proper place for the camp of instruction, I should say that it is for those authorities finally to determine that question, and that all I had to look to would be whether they were using the land in any way except in a reasonable way as a camp of instruction; and here again the judge must be very careful. As I

said before, if it was an outrageous use, I have no doubt the court would interfere. I can imagine such a use of land under the name of a camp of instruction, that it would be so entirely opposite to a camp of instruction that the court would say at once it was a mere subterfuge, and not a *bona fide* use of the land, but the moment the court is satisfied that it is a *bona fide* use of the land for the purposes of a camp of instruction it appears to me that the court's function stops, that it has no right to say that the tents shall be pitched on another piece of land, or that targets are to occupy a different piece of land. That is for the military authorities to decide, and that would be their province and not the province of the court.

Then it follows from all I have said, without any further statutory enactment, that the power so conferred on the military authorities was a legal right to the use of the land for that purpose, although such a use would, without the authority of Parliament, have been illegal. If that is so, it is impossible to maintain an action for nuisance.

Now, independently of what I said as to the general meaning of the statute, I have referred to the particular statute which recognizes the particular use to be made of this particular land; it seems this land was bought in 1855, 530] and was then devoted, with some *other land in the neighborhood of Aldershot, to the purposes of a military camp, and by an act of Parliament, being 19 & 20 Vict. c. 66, the user was recognized as being a proper user, and authority was taken to close the roads going over this and the adjoining lands for the purpose of making that user more effectual. That is a very strong recognition of the propriety of the decision of the military authorities in devoting this particular piece of land to the purposes of a military camp. [His Lordship then read the preamble to the act.]

There is a legislative recognition that the formation of a camp for the instruction and training of troops in the science of war and their duties relating thereto at that part is not only proper, not only useful, as it is called there, but it is useful and so much for the public service that you are entitled to stop up public roads across the common, because the land was intended to be used for the public service. It appears to me, therefore, that here you have a legislative recognition of the rightfulness of the discretion exercised by the War Department, in preferring this land for the purpose; and without intending, as I said before, finally to decide the question, it seems to me it would be a very strange exercise of authority for me to hold that such a user

of the land so authorized by the Legislature is a common nuisance which ought to be restrained by injunction.

Solicitors for plaintiff: *Walker & Battiscombe*.

Solicitors for defendant: *Hare & Fell*, for Solicitor to the Treasury.

See 14 Eng. Rep., 556 note; 17 Eng. Rep., 200 note.

A military officer who negligently gives a command, in drilling his subordinates, for them to snap their guns when pointed towards spectators, one of the guns accidentally proving to be loaded, is liable to a spectator injured by its discharge: *Castle v. Duryea*, 32 Barb., 480, 2 Keyes, 169, 1 Abb. Dec., 327.

If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear from the defendant's plea and evidence that he was guilty of no negligence, and that the injury was inevitable: *Weaver v. Ward*, Hobart, 184; 2 Greenl. Ev., § 85.

A gun discharged in the ordinary and regular course of ball-practice by an artilleryman, in a garrison town, missed the mark and killed a man who was lawfully passing near the spot in a boat, the place being a public one and open to all Her Majesty's subjects. The artilleryman who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the major-general. Held that the major-general was not guilty of manslaughter: *Reg. v. Hutchinson*, 9 Cox's Cr. Cas., 555.

The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care; therefore, where defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage occurred to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; held that defendant was liable to damages in an action on the case: *Dixon v. Bell*, 5 M. & S., 198.

Where the defendant fired a pistol, the ball of which glanced and hit the plaintiff, and it was found that the in-

jury was unintentional but was the result of gross and culpable carelessness on the part of the defendant, it was held that trespass *vi et armis* would lie: *Welch v. Durand*, 86 Conn., 182; *Wright v. Clark*, 50 Verm., 180.

A party is liable, to one injured when passing along a public highway, for damages occasioned by his gross neglect, in handling his gun, though it is discharged accidentally: *Chataigne v. Bergeron*, 10 La. Ann., 699.

The defendant was uncocking a gun and the plaintiff standing to see it; it went off and wounded him. Held that the plaintiff might maintain trespass: *Underwood v. Hewson*, 1 Strange, 596.

The owner of a vessel, by merely permitting the master to have the custody of a gun and ammunition, with other equipments, on board of the vessel, does not become responsible for the careless use thereof by one of the crew. The mere permission and control of such gun and ammunition cannot create or imply permission, much less authority or duty, to make use of them, in the face of the positive orders of the owner to the contrary. The discharge of a cannon on board of a pleasure vessel or yacht, by order of its master, in the harbor of New York, when not necessary for its navigation, or a matter of duty to other vessels, or done in compliance with any custom governing vessels in such harbor, or vessels belonging to the yacht squadron to which such yacht belongs, forms no part of the duty of such master; and the owner of such yacht is therefore not responsible for any carelessness in such discharge.

The extent of the employment of a servant may be limited by agreement or a general command, so as to deprive him generally of the right of doing acts of a particular character in such employment.

Although the prohibition of a specific act which is within the scope of a general employment, on a particular occasion only, or of a particular mode of

doing them, may not exempt the employer from liability, yet prohibiting their being ever done curtails the extent of the employment. No action will lie against the owner of a vessel or pleasure yacht for a personal injury sustained by the plaintiff from the wadding of a cannon, negligently discharged on board of the vessel by one of its crew during the absence of the owner, when it appears that such owner had previously given strict general orders to all the crew not to fire any guns unless he was on board: *Haack v. Fearing*, 5 Robt., 528, 4 Abb., N.S., 297, 35 How. Pr., 459.

A declaration that the defendant, knowing that the plaintiff, a child eight years old, had neither experience in nor knowledge of the use of gunpowder, and was an unfit person to be intrusted with it, sold and delivered gunpowder to him, and that he, in ignorance of its effects, and using that care of which he was capable, exploded it and was burned thereby, set forth a good cause of action to which the fact that the defendant was a duly licensed seller of gunpowder is no defence: *Carter v. Towne*, 98 Mass., 567.

A boy bought some gunpowder, and, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while his parents were away; a week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the cupboard, fired it off and was injured by the explosion.

Held that the injury was not the direct or proximate, natural or probable, result of the sale of the powder, and the seller was therefore not liable to the child for the injury: *Carter v. Towne*, 103 Mass., 507.

The act of exploding fire crackers, in the public streets of a city, is wrongful and unlawful; and if any injury to the person of individuals, or to property, animate or inanimate, results therefrom, the wrongdoer is liable to compensate the sufferer: *Conklin v. Thompson*, 29 Barb., 218.

And infancy of the defendant is no defence. He is as fully liable for the damages sustained as if he were of full

age: *Conklin v. Thompson*, 29 Barb., 218.

Where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully travelling thereon was accidentally struck by the ball, it was held that all the persons so engaged were liable in trespass; provided that, from the width of the road, and the number of persons usually travelling thereon, for the ordinary purposes of travel, the game was of such a character as to endanger the safety of travellers and passengers, and that the individual, by whom the ball was thrown, was acting in the usual manner of persons engaged in such game: *Vosburgh v. Moak*, 1 Cush., 453.

As to the liability of carriers and of shippers for injuries from explosives, see 14 Eng. Rep., 557 note; 17 Eng. Rep., 200 note; Boston, etc., v. Carney, 107 Mass., 568.

One who negligently leaves a loaded truck in the street in such a condition that children may be injured thereby, may be held liable for an injury inflicted upon a child by another's interference with the truck: *Lane v. Atlantic Works*, 107 Mass., 104.

Defendant left his horse, which was accustomed to run away, which fact defendant knew, in a public street, unhitched, in charge of a boy fourteen years old, who was not well and was incapable of managing the horse. The horse took fright and ran away, and ran against and fatally injured plaintiff's horse which was hitched in the street. Held, that defendant was guilty of negligence, which rendered him liable for the loss of plaintiff's horse: *Frazer v. Kimler*, 5 Thomp. & Cooke, 16.

If there be any duty resting upon a city in regard to the sufficiency of hitching-posts it may provide, it is not bound to see that absolutely safe posts are set, and no more than ordinary care in the selection and setting of them is required. If they are such as would be reasonably sufficient under all ordinary circumstances for the purpose intended, the city will not be liable for an injury caused by the breaking of one by a team fastened to it and its running over a person.

Where a horse with a cutter became frightened and ran away, and in pass-

ing where a team was hitched to a post set by a city for a hitching-post, frightened the team and caused them to break the post and run, and they, after running some distance, ran over a person in the street and injured him, it was held, in an action by him against the city, that the injury was too remote and was not the proximate consequence of the defect in the post, and that the city was not liable: *City of Rockford v. Tripp*, 83 Ills., 247.

Plaintiff was left by her husband in a carriage on the streets of Joliet, and during his absence a blast was fired by workmen who were, by the consent of the city authorities, engaged in constructing a private sewer to connect with main sewer. The team was frightened by the blast, ran away and overturned carriage, and plaintiff was injured. It was shown that the blast was the first one fired, and it was matter of doubt whether the city officers knew that the workmen were going to work in the blast. Proof was offered to show that one of the councilmen had told workmen they must not blast, which was rejected. Held this was error. If blasting was done against orders of city officers, and without their knowledge, the city was not liable. Reasonable care to prevent accidents is all that can be required of city officers. Decision of C. B. & Q. R. R. Co. v. Payne, 49 Ills., 499, on contributory negligence dissented from: *City of Joliet v. Seward*, 2 Monthly Jurist, 6.

Where defendant negligently so piled some boards in the travelled part of a public highway that, when a wagon, loaded with barrels, was driven over those boards a rattling noise was caused, which frightened the plaintiff's well broken and carefully driven horse, which being frightened by the noise suddenly started and threw the plaintiff, while carefully driving, out of his wagon, whereby he was seriously injured, it was held that it was for the jury to determine whether or not the defendant's acts were the proximate cause of the plaintiff's injury: *Lake v. Milliken*, 62 Maine, 240.

The defendant, after washing out a gun, went to the door of his shop, and, standing there, discharged it for the purpose of drying it, the shop door being about a rod from the highway. At the time of the discharge plaintiff's

horse, harnessed in his chaise, was fastened, by his bridle, to the fence, on the opposite side of the highway. The horse, being frightened by the discharge of the gun, broke the bridle and ran away with the chaise, which was thereby broken and injured. Held, defendant was liable in trespass *vi et armis*: *Cole v. Fisher*, 11 Mass., 137.

The court in this case said (p. 139): "The court would take this occasion to observe upon the dangers to which travellers and passengers on foot and in carriages are exposed by discharges of guns in or near the highways—dangers affecting not only the property, but the limbs and lives of their fellow citizens, and others entitled to the protection of the laws. The extreme inconsiderateness, and sometimes the purposes of wanton mischief, discoverable in acts of this description, are to be corrected and punished. The party injured, either in his person or property, by the discharge of a gun, even when the act is lawful, as at a military muster and parade, and under the orders of a commanding officer, is entitled to redress in a civil action, to the extent of his damage; and where the act is unnecessary, a matter of idle sport and negligence, and still more where the act is accompanied with purposes of wanton and deliberate mischief, and any hurt or damage ensues, the guilty party is liable, not only in a civil action but as an offender against the public peace and security, is liable to be indicted; and, upon conviction, to be fined and imprisoned, and, indeed, to worse consequences, where loss of limb or of life is the consequence of this inhuman negligence and sport": *Cole v. Fisher*, 11 Mass., 136.

Trespass *vi et armis* is the proper remedy for an injury of which the defendant is the immediate cause, though it happen by accident or misfortune. Therefore, for beating a drum in the highway, where a wagon and team are passing, by which the horses take fright, run away and damage the wagon, this action may be supported by the owner: *Loubz v. Hafner*, 1 Dev. (N. C.) Law, 185.

If one's team be frightened by other teams trying to pass each other at an immoderate speed, he may recover the damages: *Burnham v. Butler*, 31 N. Y., 480.

See also *Center v. Finney*, 17 Barb., 94, affirmed Seld. Notes, April, 1853, p. 80, 2d ed.

But the owner of a team is not liable for an injury they inflict if rendered unmanageable by being struck by a wrongdoer: *Weldon v. Haerlem*, etc., 5 Bosw., 576.

So if they be frightened by a locomotive: *Brown v. Collins*, 53 N. H., 442, 13 Am. Law Reg., N.S., 364.

If a horse be frightened by an engine and train of cars, so that he rupture a blood vessel and die therefrom, the railroad company is not liable unless the injury resulted from some wrongful act thereof, either of omission or commission: *Moshier v. Utica*, etc., 8 Barb., 427.

While defendant's servants were employed in the attempt to replace on the track one of defendant's engines, which had run off it, near a highway crossing, but within defendant's grounds, the female plaintiff, with another woman, approached the crossing with a horse and wagon and asked defendant's servants if they might cross, when one of them said, yes, and then one winked at the other and laughed. While she was crossing, she herself holding on to the horse by the head, and the other woman sitting in the wagon holding the reins, steam was let off through the sides of the engine, and the horse becoming frightened knocked down the female plaintiff and injured her.

Held, an actionable wrong for which the defendants were liable.

Held, also, that there was clearly no evidence of contributory negligence, as every precaution was used in crossing.

Semble, that even if the act was an unnecessary and wanton act on the part of defendants' servants, the defendants would still be liable, for it was done in the course of their (the servants) service and employment, and for the purpose, though ignorantly, of promoting the object of it: *Stott v. Grand Trunk R. W. Co.*, 24 U. C. C. Pl., 347.

To negligently frighten an animal, being at the time driven by the plaintiff, renders the persons guilty of the negligence liable to respond in damages for any injury sustained by the plaintiff in consequence of the fright. Railroad train out of time should give

notice of its coming if there are reasonable grounds to apprehend that teams on a turnpike, near by, would be frightened by the passing train.

Whether there was negligence in failing to give warning of the approach of the train in this case was a question for the jury and not for the court.

In order to recover for injuries resulting from the use of a steam-whistle attached to a locomotive, it must be shown that the circumstances attending the use were such that a prudent regard for the rights of others forbade it: *Hudson v. L. & N. R. R. Co.*, 14 Bush (Ky.), 303.

In a suit for personal injury received by frightening a team and causing it to run away, by the sounding of a whistle on a locomotive, under an allegation that while the defendant's train was approaching from the rear of the team its servants caused the whistle to be sounded in a loud, shrill, unnecessary and negligent manner, "needlessly, wantonly, negligently and maliciously," whereby the team was frightened, etc., it was held competent for the plaintiff to show a case of negligence on the part of the defendant, and for the latter, in defense, to show plaintiff's negligence in putting himself in a place of danger, and in such case, unless the negligence of the defendant was gross and that of plaintiff slight in comparison, no recovery could be had.

But when the declaration charged that as the train was approaching in the rear, the servants of the defendant caused the whistle to be sounded in sharp, shrill, loud sounds, and in quick and rapid succession, "needlessly and recklessly, wilfully, wantonly and maliciously," whereby, etc., it was held that no recovery could be had upon proof of mere negligence on the part of the defendant, but that to authorize a recovery it must be proved that the sounding of the whistle in the manner charged was done needlessly, and either wantonly, recklessly, wilfully or maliciously.

If the whistle of a locomotive on an approaching train is needlessly sounded and done so wantonly, recklessly, wilfully or maliciously, in such a manner as to frighten a team of horses being driven in a narrow lane near by, and cause them to run away and injure the

plaintiff, it is no defence to a suit for damages to show that the plaintiff was guilty of negligence in entering the lane. Such negligence will not excuse the wanton, wilful or malicious act causing the injury.

If the alarm whistle of a locomotive is needlessly sounded in the rear of a team while travelling in a narrow lane near the railroad track, and is continued while the horses are running away with the plaintiff and his conveyance, the engineer having full knowledge that they are running away, and until the train comes abreast of the team whereby the conveyance is overturned and the plaintiff injured, such sounding of the whistle is wanton, wilful and reckless, if not malicious.

Whether a given state of circumstances shows malice or wilfulness is always a question of fact and never a question of law: *C. B. & Q. R. R. Co., v. Dickson*, 88 Ills., 431.

Negligence is the absence of care, according to the circumstances.

It is the duty of an engineer approaching a highway, if danger is to be apprehended, to give warning by sounding the whistle, or other sufficient alarm; the failure to do so is negligence *per se*, to be determined by the court.

The court is to decide the question of negligence, where the precise duty is determinate and the same under all circumstances.

A wanton, unnecessary sounding of the whistle is negligence.

A railroad company having a chartered right to propel their cars by steam, are not responsible for injuries resulting from the proper use of such agency.

Whether alarming a horse and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train.

What would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city.

A train was passing through a city on a railroad which had a number of short curves, so that persons could see the train but for a short distance; it was crossed by several streets, and

passed over a river on a draw-bridge; the rule of the company required that the whistle should be sounded about a certain point, to warn the bridge-tender and persons about to cross at other streets. Held, the use of the whistle at that point in the ordinary manner was not negligence.

If the whistle had not been sounded at such point, and one had been injured by reason of the omission, it would have been negligence *per se*.

One driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move their trains on their road is as high as that of the individual to use the public road: *Frankford & Bristol Turnpike Co. v. Phil. & Trenton R. R. Co.*, 4 P. F. Smith, 845, adopted; *Phil., Wil. & Bal. R. R. Co. v. Stinger*, 78 Penn. St. Rep., 219.

Although a railroad company is not liable for frightening the horse of a passer-by with the whistle of an engine, proprietors of factories have no right to use steam-whistles in their factories so located, of such a character, and used in such a manner as to frighten horses of ordinary gentleness when passing upon a highway adjoining their land; and they are responsible for an injury caused by an unnecessary alarming or frightening use of them. It is not negligence to drive a horse upon a highway, in the course of one's business, in good faith, where such a whistle may be unnecessarily blown: *Knight v. Goodyear, etc.*, 88 Conn., 438.

The court distinguishes between the use of whistles upon locomotives by saying, "such whistles are necessary upon railroad engines to frighten horses and cattle that may stray upon the road in front of the engine and drive them from the track. They are also necessary to give notice of the approach of a train to persons about to cross the track at such a distance that the bell cannot be heard. In these and other cases their use upon railroads is important and valuable, and both sanctioned and required by law. * * * This is well understood; and the owners of animals which have not become accustomed to whistles are bound to submit to the necessities of

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the case, and if they drive them where *locomotive* whistles are liable to be blown, they take the risk upon themselves, and if any injury results they can have no redress. But the rule should be, and is, different in respect to whistles used upon factories. Their use is not necessary at all."

The plaintiff's horse, which was in the habit of pulling when tied at a post, but otherwise gentle, was fastened by the plaintiff with a stout rope by the side of a public street, when a steam-whistle upon the top of the defendants' factory, about fifteen rods distant, was blown, as a notice to the operatives. The sound was shrill and calculated to frighten ordinary horses. The horse was frightened and pulled violently at his rope, which gave way, and he was killed. It was found that if the whistle had not been sounded the horse would not have pulled; and that if the horse had not been free from the habit of pulling he would not have been killed. Held that, upon this finding, the death of the horse could not be regarded as caused by the negligence of the defendants, and that they were not liable.

A steam-whistle may be used so as to become a nuisance, but it is not necessarily so: *Parker v. Union Woolen Co.*, 42 Conn., 398.

A railroad corporation neglecting, when a train is approaching a place where its road crosses a highway at grade, to give the warning required by St. 1862, c. 81, or neglecting to give other proper warning beyond that required by statute, is liable to one injured thereby, though the injury results not from a collision but from the fright, not guarded against for want of such warning, of the horse he is driving: *Norton v. Eastern Railroad Co.*, 113 Mass., 366.

A railroad corporation, whose road passes over a highway by a bridge, is not liable to a traveller in the highway for damage caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation know that, because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although they give no warning of the approach of the train:

Favor v. Boston & Lowell R. R., 114 Mass., 350.

A corporation or an individual is liable if a horse be frightened by a derrick, or other object calculated to frighten a horse, which is left projecting over or near to a highway.

Connecticut: *Clinton v. Howard*, 42 Conn., 294; *Ayer v. Norwich*, 39 Conn., 376; *Young v. New Haven*, 39 Conn., 435; *Phelon v. Stiles*, 43 Conn., 426.

English: *Hill v. New River Co.*, 9 Best & Smith, 303.

Illinois: *Chicago v. Hay*, 75 Ills., 530.

Indiana: *Brookville, etc., v. Pumphrey*, 59 Ind., 78.

Maine: *Card v. Ellsworth*, 65 Me., 547.

Massachusetts: *Jones v. Housatonic, etc.*, 107 Mass., 261; *Judd v. Fargo*, 107 Mass., 264.

But see *Bemis v. Arlington*, 114 Mass., 507.

Nebraska: But see *A. & N. R. R. v. Loree*, 4 Neb., 446.

New York: *Eggleston v. President, etc.*, 18 Hun, 146.

The rails of defendants' track where it crossed a highway projected from eight to nine inches above the level; and while the plaintiff with a pair of horses and wagon was crossing over, an engine standing close by whistled to give notice of the train starting. This caused the horses to start forward, striking the wagon against the projecting rails and breaking the whiffletree, in consequence of which the horses ran away and one of them was injured. Held, that defendants would not be liable if the whiffletree was broken by the sudden starting of the horses without reference to the state of the track, for it was not proved that the blowing of the whistle was an unnecessary and unlawful act; but that if the accident happened through the defective state of the track they would be liable, and the case should have been left to the jury without any evidence on the plaintiff's part to show what the state of the highway was before defendants' railway intersected it: *Thompson v. The Great Western Railway*, 24 U. C. C. Pl., 429.

In an action for injuries caused by a horse taking fright on the highway at

an engine being propelled by steam, it is error to permit the right of recovery to turn upon whether the engine was calculated to frighten horses of ordinary gentleness; the bringing of an unsightly object into the common highway is not necessarily a wrong because of its tendency to frighten horses, any more than the construction of a bridge over a river is a wrong because of its tendency to delay vessels.

If one in making use of horses as a means of locomotion on the highway is injured by the act or omission of another using a steam locomotive, the question is not one of superior privilege, but whether, under all the circumstances, there is negligence imputable to some one, and if so, who should be accountable for it.

The engine, as a means of locomotion in the highway, is not necessarily a nuisance, and the question whether its use as such has, in a particular instance, been so negligently managed to the injury of others as to give rise to a right of action, is one of fact for the jury as a question of reasonable conduct and management on the part of both parties: *Macomber v. Nichols*, 34 Mich., 213.

Where a city licenses an exhibition of wild animals (in this case two large bears), knowing that it is calculated to frighten horses and endanger the lives and property of persons travelling in the streets, and the officers and agents of the city knowingly and carelessly allow one of its streets to be obstructed by such exhibition, and a person travelling with a team along such street is injured in consequence of the team becoming thereby frightened and unmanageable, the city is liable in damages: *Little v. City of Madison*, 42 Wisc., 643.

Where an injury happened to the plaintiff in consequence of his horse taking fright at an elephant passing along the highway in the charge of a keeper, prior to the passage of the act of April 2, 1862, p. 262, regulating the use of public highways: Held, that to render the owners of the animal liable for the damage sustained, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the owners knew or had notice of it: *Scribner v. Kelley*, 38 Barb., 14.

The body of a common riding wagon left on the side of the road, and laid up edgewise against some bushes, within the limits of the road but entirely outside of the travelled track, which frightened a horse and thereby caused an injury, is not such an incumbrance as would render the town liable in damages for a defective highway, the question decided being referred to the court as one of both fact and law. The town could not reasonably have expected that such an object would naturally have the effect to frighten an ordinarily kind, gentle and safe animal, well broken for travelling upon public roads: *Nicholas v. Athens*, 66 Maine, 402.

An object in a highway, with which a traveller does not come in contact or collision, and which is not an incumbrance or obstruction in the way of travel, is not to be deemed a defect for the reason that its bright appearance causes a horse to take fright, in consequence of which he momentarily escapes from the control of his driver and causes damage: *Cook v. Inhabitants*, etc., 115 Mass., 571.

The existence of a broken down wagon with a bright red board sticking up in it, on the side of a highway, and partly in the ditch where it had been hauled by the owner, some eight or ten feet from the travelled part, leaving plenty of room to pass, and remaining there for ten days, does not constitute evidence of actionable negligence on the part of the corporation.

When, therefore, after the lapse of such ten days, the plaintiff, in passing by with a horse and wagon, was thrown out and injured, in consequence of the horse taking fright at the wagon and board, and shieing; held that the corporation were not liable: *Rounds v. Corporation of Town of Stratford*, 26 U. C. Com. Pl., 11.

"It is a general rule, that where a party is doing an illegal act, he is liable to other persons injured thereby, regardless of intention to do the injury, or care manifested to avoid it.

Persons encamping and hunting upon the public lands, in a 'wilderness' district, are not guilty of such an illegal, mischievous or wanton act, as would render them liable, at all events, for any injury that may result therefrom to others, regardless of any

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diligence, care or prudence on their part to prevent such injury.

Where one is doing a lawful act—or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others—he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others; but he is answerable for damages resulting from negligence, or a want of such care and caution on his part.

If parties hunting, or encamped in the woods or prairies, covered with combustible matter, suffer or permit, otherwise than in consequence of *unavoidable accident which could not be prevented by proper care*, the fire to communicate to such combustible matter, they are liable for all property destroyed thereby.

If the parties in such case are not guilty of *negligence*, they are not responsible for the property destroyed; but it is error to instruct the jury that they are not liable if they used *ordinary diligence*." *Bizzell v. Booker*, 16 Ark., 308.

[6 Chancery Division, 531.]

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**In re GORDON.*

ROBERTS V. GORDON.

[1877 G. 61.]

Will—Trust for Sale of Real Estate—Legal Estate—Renunciation of Probate by Trustee—Election to take as Real Estate.

Devise and bequest of freehold and copyhold land and personal estate to A. and B., upon trust as to the land for sale, and as to the personalty to realize the same, and to stand possessed of the proceeds upon trust for C. M., who was his heir-at-law, absolutely. A. predeceased the testator; B. renounced probate, and died three years afterwards, not having acted as trustee, though he did not disclaim the trusts, and letters of administration with the will annexed were granted to C. M. From and after the testator's death C. M., through his agent, received the rent of the land, but did not exercise any other act of ownership. No one was admitted tenant of the copyhold. The land was let from year to year, and there was one change of tenancy effected by the agent. On the death of C. M., who survived the testator nearly nine years, the question arose whether the land was to be treated as real estate:

Held, that on B. renouncing probate, the legal estate devolved on C. M., and that, whether the legal estate was outstanding or not, C. M. must be taken to have elected to take the land as real estate.

THE testator, Cosmo Gordon the elder, by his will, dated the 25th of September, 1851, after a specific gift to his wife, gave all his freehold and copyhold estate, and all his personal estate not before bequeathed, to Sir Edmund Antrobus and Alexander Trotter, their heirs, executors, and administrators, upon trust, as to the real estate, that the trustees or trustee should at such time or times after his death as they or he should think fit, sell the same, and he declared that the moneys to arise from such sale should sink into and form part of his personal estate, and that his real estate, and so much thereof as should from time to time

remain unsold, should be considered as personal estate, and the rents thereof until sale be applied in like manner as the dividends, interest, and annual proceeds of the securities upon which the money to arise by the sale thereof was thereafter directed to be invested would be payable and applicable in case the real estate were actually sold; and, as to the personal estate, the trustees were to hold it upon *trust to realize the same; and the testator declared [532 that the trustees should stand possessed of the proceeds of the sale of the real estate and of the personal estate upon trust, after payment of his debts and funeral and testamentary expenses, for his wife for life, and after her decease, upon trust for his son, Cosmo Gordon, absolutely, but if he should die in the testator's lifetime, then over; and he appointed Sir Edmund Antrobus and Alexander Trotter executors of his will.

The testator's wife and the said Alexander Trotter both died in his lifetime. The testator died on the 7th of March, 1867.

The surviving trustee, Sir Edmund Antrobus, renounced probate of the will, and did not in any way act as trustee, but did not execute a disclaimer of the trusts. On the 2d of May, 1867, letters of administration with the testator's will annexed were granted to the said Cosmo Gordon, who partly administered his father's estate. In 1870 Sir E. Antrobus died.

The testator was seised of a farm at Gillingham, partly freehold and partly copyhold. After his death Cosmo Gordon received the rents through an agent. He never took any steps to be admitted tenant of the copyholds, and no one had since been admitted thereto. He did not grant any lease of the property, which was let on a yearly tenancy; on the death of the tenant the agent allowed his widow to take possession of the farm. Cosmo Gordon resided in another county, and never visited the farm.

There was some correspondence tending to show that he was regarded as the owner of the farm.

On the 18th of January, 1876, nearly nine years after the decease of his father, Cosmo Gordon died intestate, whereupon the plaintiff, his half-sister and his sole next of kin, took out administration to his estate, and also took administration with the will annexed, to the testator's estate left unadministered.

The question in the case was whether the farm was to be treated as converted and as personal estate, or whether Cosmo Gordon was to be taken to have elected to take it as

real estate. The plaintiff, as the personal representative of Cosmo Gordon, alleged that he had not elected to take the farm as real estate, and claimed to have it sold and the proceeds paid to her; the defendant, his heir-at-law and customary heir, claimed it as real estate.

533] **Davey*, Q.C., and *V. Hawkins*, for the plaintiff: The plaintiff in this case, as the personal representative of Cosmo Gordon, is entitled to the proceeds of the sale of the farm at Gillingham, unless it can be shown that Cosmo Gordon elected to take it as real estate. The circumstances here are insufficient to support such a presumption. First, the legal estate is still outstanding, as the renunciation of probate by Sir Edmund Antrobus is not enough without a disclaimer of the trusts of the will. Besides, there is no evidence of any act done by Cosmo Gordon which would show an intention of treating the farm as real estate. In *Crabtree v. Bramble*(¹), which may be cited as showing an intention to take land devised in trust for sale as real estate, there were circumstances on which the court relied as showing such intention. Mere lapse of time will not alter the rights of the parties claiming, in the absence of some act of ownership. It is for those who say the land has been reconverted to show the acts on which they rely. The principles on which the court presumes an election to take the land as realty were considered in *Harcourt v. Seymour* (²); *Mutlow v. Bigg* (³); *Dixon v. Gayfere* (⁴); *Davies v. Ashford* (⁵). There is no case in which such a presumption has been inferred as to copyholds where no one has been admitted, nor is there any authority for holding that the mere lapse of nine years is sufficient without any act or circumstance to raise a presumption in favor of the defendant's contention. In *Brown v. Brown* (⁶) three years and a half was held insufficient to support a case of alleged reconversion.

Chitty, Q.C., and *Dunning*, for the defendant, were not called on.

JESSEL, M.R.: This point has, as it appears to me, been settled years ago. [His Lordship then stated the facts of the case down to the death of Sir Edmund Antrobus.]

The first question that I have to consider, though I should have come to the same conclusion as I have on the other 534] parts of the *case if my opinion had been the other way, is whether or not the legal estate remained in Sir Edmund Antrobus, or whether it passed to the heir-at-law,

(¹) 3 Atk., 680.

(²) 2 Sim. (N.S.), 12.

(³) 1 Ch. D., 385; 19 Eng. R., 803.

(⁴) 17 Beav., 433.

(⁵) 15 Sim., 42.

(⁶) 33 Beav., 399.

Cosmo Gordon. I think there was sufficient evidence of disclaimer. My reasons for saying so are these. In the first place we have this, that he never acted; that is a very strong circumstance, a man lives three years and does not act at all. It is a strong proof that he does not intend to act. Of course it is not in itself conclusive, but it is evidence that he does not intend to act. But, when we have the trusts of the will and the personal estate combined, the real estate to be sold and made a mixed fund, and to be applied with the personal estate in paying debts, legacies, and funeral expenses, and we find the same people appointed executors, and the gift of the personal estate is not to him except the direction to get it in and divide it, and then we find the trustee renouncing, it is conclusive evidence; he renounces execution of the will as to the personal estate, he cannot carry out the trusts as to the payment of the debts and funeral and testamentary expenses, as that is the executor's business, and the person who takes out the administration must perform it. He cannot, as I understand it, get rid of a part of his trust in this way. In other words, it is evident that he intends to have nothing to do with the will, that he intends, in fact, to disclaim all the trusts; that is material evidence, and therefore I think the legal estate is in Cosmo Gordon.

If, however, I thought the bare legal estate was still in Sir Edmund Antrobus, the conclusion I should arrive at as to the election would have been the same.

What happens next? Cosmo Gordon the younger took possession of all the real and personal estate, that is, he by his agent received the rents, and died on the 18th of January, 1876, intestate; for nearly nine years his agent received the rents in the regular way, accounting to him for the balance after making the necessary payments. There seems to have been one change of tenancy. The tenant died, and the widow was let into possession by the agent. Nothing more seems to have been done. There was some correspondence about the estate, a correspondence which only shows, as the fact was, that Cosmo Gordon was treated as the owner.

*Now, under those circumstances, has he or not [535 got the estate home, and shown an intention of keeping it? I think he has. Upon this point I will read a few words from an old case which was frequently referred to in the course of the argument, *Crabtree v. Bramble*(¹). The case is remarkable for this, that the decision was not only that a certain act done as regards real estate reconverted it, but

(¹) 3 Atk., 680.

that it reconverted another estate subject to the same uses, the presumption being that if you intend to reconvert one estate you intend to reconvert all. Lord Hardwicke says ('): "The second question is, as to the election of Elizabeth the daughter, whether there be any evidence in the case of her electing to keep this as land? It must be allowed equity follows the contracts of parties, in order to preserve their intent, by carrying it into execution, and depends on this principle, that what has been agreed to be done for valuable consideration is considered as done, and holds in every case except in dower; and therefore where money is to be laid out in land, there the court will make it have the property of land; the same rule of lands to be converted into money." In that case there were two successive tenants for life—Richard Crabtree, the father, who died in 1701, and the mother, who died in 1742. Elizabeth, who was entitled in remainder, did not survive her mother quite two years. There the legal estate was undoubtedly outstanding in trustees. Lord Hardwicke observes: "She, on the mother's death, entered on the land, and from that time continued in possession for two years, received the rents, made no application to trustees to sell, nor brought a bill against them to sell, though she had a right to apply to them to sell, and, as *cestui que trust*, might have contracted for selling, and bound the trustees."

Every word of that applies to Cosmo Gordon, assuming the legal estate to be in the trustees, with this addition, that here it is nine years instead of two. Lord Hardwicke then refers to an additional point which does not occur in this case: "But there is still something more in the case; she made a lease in 1729 of the lands, reserving a rent to her and her heirs, and likewise in 1739, with the same reservation. This hath been insisted to be a *further act to show she approved of its continuing as land"—he uses the words "further act" to show, in Lord Hardwicke's opinion, that what she did in entering into possession, receiving the rents for a period of two years, and making no application to the trustees to sell, was at least an act—"It was objected, the leases were made in the lifetime of the mother, who had her life in the estate; but the question is not, whether she had a right to lease it out, but whether this does not amount to an approbation of its continuing as real estate." Then he goes on to say, "Had she any right to make an election at twenty-one, after the death of the father, as she was the only child of the marriage? I am of opinion that she had a

(') 3 Atk., 687, 688.

right to elect even during the mother's life, and that she might have come into this court to compel the trustees to sell this reversion for her benefit, even in the mother's lifetime; and though she had this right, yet instead of doing this she makes leases of the lands, reserving rent to her, her heirs and assigns. Can there be a stronger evidence to show her intention to continue it as real estate, than that she had bound her heirs to make good this lease? It has been said the trustees in point of law had a right to receive the rents, and to be sure they had; and yet she enters against their possession, and grants leases of the lands; and it was a very material observation of the defendant's counsel with regard to the heir's being liable to an action on the part of the lessees."

It appears to me that Lord Hardwicke considered all that as being an additional act strongly confirmatory, but made an additional act to the act of taking possession and receiving the rents. Strictly speaking, she had no right to the possession, because the trustees had it; she had no right to receive the rents, because the trustees had a right to receive them. In Lord Hardwicke's opinion what she did take, independently of that further act, she would have been entitled to take, though he did lay hold of the further act, which made it more applicable to confirm the conclusion he came to.

Now, of course in this case there are no acts binding the heir by covenant, because the common term "from year to year" did not bind the heir. But there is this observation to be made, and *in that respect it appears to me to [537 come within the principle of *Crabtree v. Bramble* (1), as he did let to a new tenant from year to year, he would have been liable to an action by the tenant if the trustees had afterwards exercised the trust for sale, supposing they had sold the estate and that tenant had been evicted. I am not prepared, however, to say that my opinion would have been different if there had been no change of tenancy during the nine years.

Then, in *Wheldale v. Partridge* (2), Lord Eldon says this: "The money being once clearly and plainly impressed with real uses, as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to that impression, it must be shown, either, that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devo-

(1) 3 Atk., 680.

(2) 8 Ves., 235.

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lution of the property upon either." Then he says: "And it is not correct to say, the court does not interpose between volunteers, if they give to the executor that money, which the instrument has given to the heir. The case of *Pulteney v. Lord Darlington* (¹), in the House of Lords, a case much agitated, and upon which all the great lawyers were consulted, went no farther than this; that, if the property was at home, in the possession of the person, under whom they claimed as heir and executor, the heir could not take it; but, if it stood out in a third person, he might; and the question in that cause was, not upon the equity between the heir and executor, but, whether the money was at home." Then he says: "In the older cases there is no doubt, that if a real use was once impressed upon the property, it went through all the limitations, till it was at home in the pocket of the party, or any act done by him, to take off that impression, so as to entitle the executor. The slightest act would do." I have read down to those words to show that it is something very slight, and there is reason for saying so. There is no equity as regards the personal representative, there was no human being who could call on Cosmo Gordon to sell the estate or to keep it. And, of course, 538] when he died, it being, as it was, land, you must, *in order to raise up the equity in favor of the person claiming it as being something other than it really was, show some contract binding on the estate.

The cases of *Harcourt v. Seymour* (²) and *Dixon v. Gayfere* (³) have also been referred to. All that Lord Romilly said that was pertinent to the question was, that a slight act will do, following what Lord Eldon said with regard to the converse case. In *Harcourt v. Seymour* (²) the Vice-Chancellor, afterwards Lord Cranworth, says this: "I take the law upon this case to be perfectly clear. Where, by a settlement, land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it, until somebody entitled to take it in either form chooses to elect that, instead of its being converted into money, or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no doubt that that is the law; and the only question in each particular case is, whether there have been acts sufficient to enable the court to say that the party has so determined." Then, after commenting on the argument of counsel, who contended that there must be the intention to

(¹) 1 Bro. C. C., 223; 7 Bro. P. C., 530.

(²) 17 Beav., 433.

(³) 2 Sim. (N.S.), 12.

(⁴) 2 Sim. (N.S.), 45.

convert, he says: "I do not, however, think that that is the correct view of the law. It is quite sufficient if the court sees that the party means it to be taken in the state in which it actually is. Whether he did or not know that, but for some election by him, it would be turned into land, is quite immaterial."

I think, myself, that in this case, as I said before, there are quite sufficient acts even if the estate were in the trustee. Of course if it is not, as I think it is not, it is an *a fortiori* case in favor of the defendant.

Solicitors for plaintiff: *Farrer, Overy & Co.*

Solicitors for defendant: *Kynaston & Gasquet*, agents for Bell & Freame, Gillingham, Dorset.

See 2 Spence's Eq., 256-267; 1 Roper on Leg., 640; 1 Jarm. Wills, 534, 523-533, marg. pp.; Tyson v. Blake, 22 N. Y., 258; Smith v. Van Ostrand, 64 N. Y., 278, reversing 3 Hun, 450; 5 Thomp. & Cooke, 664; Beekman v. Bonsor, 23 N. Y., 299.

Where a testator directs that certain real estate be sold, and the proceeds divided among persons named in the will, the general rule is that the legatees, if of full age, may elect to take either the land or the money, provided the rights of others are not thereby affected: *Hetsel v. Barber*, 69 N. Y., 11; *Prentice v. Janssen*, 14 Hun, 548;

1 Sto. Eq. Jur., § 793; *Crabtree v. Bramble*, 3 Atk., 680; *Seeley v. Jago*, 1 Peere Williams, 389; *Craig v. Leslie*, 3 Wheat., 62, 65; *Burr v. Line*, 1 Whart., 252, 265; *Stuck v. Mackey*, 4 Watts & Serg., 196; *Mandelbaum v. McDowell*, 29 Mich., 78, 85-6, and cases cited; *Quin v. Skinner*, 49 Barb., 182; *Reed v. Underhill*, 12 Barb., 113, 117, and cases cited.

Where the legatees have elected to take the land, the executor, who was directed by the will to sell the same, is not a necessary party to an action brought to partition it: *Prentice v. Janssen*, 14 Hun, 548.

[6 Chancery Division, 544.]

M.R., July 31, 1877.

*WILLIAMS V. HATHAWAY.

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[1876 W. 13.]

Church-building Contract—Contract Price—Trustees of Building Fund—Vicar and Incumbent—Covenant with Builder—Personal Covenant—Extras—Action against Vicar's Estates—Liability confined to Period of holding Office—Exhaustion of Fund—Covenant binding Fund only.

A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid.

Furnivall v. Coombes (1) explained.

By two contemporaneous building contracts made in 1868 between the plaintiff, a builder, of the one part, and C., vicar of the parish of St. Pancras, and A., incumbent of an ecclesiastical district within the parish, of the other part; after reciting that, under an act creating the district, C., or the vicar for the time being of St. Pancras, in conjunction with A., or the incumbent for the time being of the district, were to apply a fund, payable to them by a railway company, in building a church and parsonage for the district; it was witnessed that in consideration of sums amount-

(1) 5 Man. & G., 736; 6 Scott, N. R., 522.

ing together to the whole of the available building fund, to be paid to the plaintiff by C. and A., "their executors or administrators, or the person or persons for the time being entitled to apply the said fund under the said act," the plaintiff agreed with C. and A., "and with such person or persons as aforesaid," and C. and A., "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did agree with the plaintiff;" then followed provisions under which the plaintiff was to build the church and parsonage in accordance with plans and specifications; and a clause stipulating that the consideration moneys should be paid in manner provided by the specifications. The specifications provided for monthly payments on account of the contracts; also that the architect might order additional works; and that payments for additional works were to be made on the completion of the entire works.

In June, 1869, C., having obtained preferment, ceased to be vicar of St. Pancras, 545] *by which time the whole of the building fund had been exhausted. The buildings were completed in June, 1870.

In February, 1875, C. died, whereupon the plaintiff brought an action against his executors to recover a sum alleged to be due for "extras" under the contracts:

Held (1), that the liability of C. and A. respectively under the contracts was restricted to the period during which they were respectively vicar and incumbent, and therefore that C.'s liability terminated on his ceasing to be vicar; and (2), that in any case the liability of C. and A. extended only to the amount of the building fund, and no further.

By the Midland Railway Extension to London Act, 1863, the Midland Railway Company were authorized to take the Church of St. Luke's, King's Cross, within the parish of St. Pancras, of which church the Rev. C. H. Andrews was incumbent. By the 83d section of the act the sum of £12,500 was to be paid by the company to the vicar of St. Pancras and the incumbent of St. Luke's, to be applied by them, with the sanction of the Ecclesiastical Commissioners, in providing a new site and church for St. Luke's district, with power to apply any surplus for a parsonage house.

The Ecclesiastical Commissioners, having eventually decided that St. Luke's district should be incorporated with an adjoining district, and that a new district should be formed within the parish of St. Pancras, an act of Parliament was obtained for the purpose, entitled The St. Luke's (King's Cross) District Act, 1868, which authorized the constitution of a new ecclesiastical district, to be called the New Kentish Town district, and appointed the Rev. C. H. Andrews to be its first incumbent. It was further enacted (sect. 7) that the Rev. W. W. Champneys, the then vicar of the parish of St. Pancras, or the vicar thereof for the time being, in conjunction with Andrews, or the incumbent for the time being of the new district, should, subject to the provision thereafter contained for payment of the costs of obtaining the act, apply the said sum of £12,500 to the satisfaction of the bishop of the diocese and of the commissioners, first, in the purchase, if necessary, of an appropriate

site for and in providing a church for the new district; and, secondly, in case of any surplus remaining, in purchasing a site for and in providing a parsonage house for such district. Sect. 10 directed that the expenses of obtaining the act should be paid out of the £12,500.

*A site for a church and parsonage for the new dis- [546
trict was granted gratuitously by the Dean and Chapter of
Christ Church, Oxford.

By a memorandum of agreement made on the 23d of July, 1868, between the plaintiff, a builder, of the one part, and Champneys and Andrews of the other part; after reciting the act of 1868, and that Champneys and Andrews were, with the consent of the bishop of the diocese and of the Ecclesiastical Commissioners, about to provide a church for the said new Kentish Town district, to be called St. Luke's Church, "It was witnessed, that in consideration of £9,391 to be paid by the said W. W. Champneys and C. H. Andrews, their executors or administrators, or the person or persons for the time being entitled to apply the said fund under the said act of 1868, to the plaintiff, his executors, or administrators, in manner thereafter specified or referred to, he, the plaintiff, agreed with the said W. W. Champneys and C. H. Andrews, their executors and administrators, and with such person or persons as aforesaid, and the said W. W. Champneys and C. H. Andrews, to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves, or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did thereby agree with the plaintiff, his executors or administrators;" then followed provisions under which the plaintiff was to build the proposed new church to the satisfaction of the architect and in accordance with the plans and specifications therein referred to; and a clause stipulating that the consideration money should be paid in manner provided by the specification.

By the specification it was provided that the architect should have power to order alterations and additional works, the price of which was to be added to the contract "at the conclusion of the work;" that payments on account of the contract were to be made monthly upon the architect's certificate; and that payments for alterations and additional works were to be made "on the completion of the entire works after the balance had been ascertained by the architect."

By a second memorandum of agreement indorsed on the

547] first, *bearing the same date, and made between the same parties, a contract was entered into for building a parsonage house for the sum of £2,615. It contained a covenant in the same terms as the first agreement; and also a stipulation that the provisions of the first agreement and specification should be applicable to the present agreement. The two sums of £9,391 and £2,615 mentioned in the contracts, amounting together to £12,006, constituted the available balance of £12,500 after payment of the costs of obtaining the act of 1868.

In November, 1868, Champneys was appointed Dean of Lichfield, and on the 14th of June, 1869, he ceased to be vicar of St. Pancras, by which time the whole of the £12,006 had been expended under the contracts. The church and parsonage were completed in June, 1870, and disputes then arose as to the amount of the balance remaining due to the plaintiff under the contracts, the plaintiff claiming a sum of £1,585 for additional works or "extras."

On the 4th of February, 1875, Champneys died, having by his will appointed the defendants his executors.

In May, 1875, the plaintiff commenced an action in the Common Pleas against Andrews for the £1,585. In December following, that action was turned into a special case, which was still pending.

In January, 1876, the plaintiff, alleging that Andrews was unable to pay the £1,585, or any substantial part thereof, brought the present action against Champneys' executors, claiming to be paid the £1,585 with interest, "owing to him under and by virtue of the said agreements of the 23d July, 1868;" and for accounts.

The defendants delivered a statement of defence, alleging that Champneys did not after the 14th of June, 1869, when he ceased to be vicar of St. Pancras, interfere in any way in any matters relating to the agreements or in the works agreed to be performed thereunder; and they insisted that, according to the true construction of the act of 1868, Champneys, upon and through his ceasing to be vicar, also ceased to be entitled to apply the fund mentioned in the act and referred to in the agreements; and that according to the true construction of the agreements, Champneys, his heirs, executors, administrators, or estate or effects were not to be 548] bound or *in anywise liable thereunder after he had so ceased to be entitled to apply the same fund; and that under the circumstances the plaintiff had not any rightful claim or demand whatever against Champneys' estates and effects under the agreements, or either of them. The defen-

dants submitted further that all the funds payable under the act of 1868 having been received and applied, it was never intended by the agreements that Champneys or his estate, even if he had continued vicar of St. Pancras until the contracts were finally completed, should be liable beyond the funds receivable under the act, or in the absence of funds provided thereby; and further, that if the £1,585, or any part thereof, was payable to the plaintiff—which they did not admit—Andrews was solely, or at any rate primarily, liable therefor, and ought to have been made a party to this action. They also disputed various items in the plaintiff's claim for extras.

The plaintiff delivered a reply, and the defendants joined issue thereon.

The action now came on for trial.

Fischer, Q. C., and *Hadley*, for the plaintiff: On the first point, we submit that Champneys' estate now remains liable under these agreements. The covenant to pay the contract price is a personal one on the part of Champneys and Andrews jointly and severally; and that being so, the clause or provision attempting to limit that personal liability is void for repugnancy: *Furnivall v. Coombes* (1); *Hancock v. Hodgson* (2); *Luckombe v. Ashton* (3).

On the second point, the agreements do not limit the liability to the extent of the fund and no further; if such was the intention it should have been clearly expressed: *Greenwood's Case* (4).

[JESSEL, M. R.: It seems to me, having regard to the recitals in the agreements, the plaintiff never looked to the personal liability of Champneys and Andrews, but to this particular fund; and that the intention of the parties was to charge the fund alone. The question is whether that has been effectually done by the instruments.]

*The mere fact that all parties knew that there [549 was a particular fund sufficient, or only sufficient, to meet the amount of the contracts, cannot of itself limit the personal liability of the covenantors who ordered the work: *Horsley v. Bell* (5); note to *Cullen v. Duke of Queensbury* (6); *Eaton v. Bell* (7).

[JESSEL, M. R.: The agreement does not extend in terms to "executors and administrators," at least so far as the extras are concerned.]

(1) 5 Man. & G., 736; 6 Scott, N. R., 522.

(2) 4 Bing., 269.

(3) 2 F. & F., 705.

(4) 3 D. M. & G., 459, 482, 483.

(5) Amb., 770.

(6) 1 Bro. C. C., 101.

(7) 5 B. & A., 34.

It is not necessary to mention "executors and administrators" in order to bind them.

Chitty, Q.C., and *Kingdon*, for the defendants, were not called upon.

JESSEL, M.R.: I must decide this case against the plaintiff. The first question is one of law. It is said that if you find a personal covenant, followed, by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void. I agree that that is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining: in that case the proviso is perfectly valid. There is no authority against that view. A distinction has always been taken between a proviso which is repugnant to the covenant and therefore void, and a proviso which can be incorporated in the covenant, and be made consistent with it. The leading case on the subject is *Furnivall v. Coombes* (*). There the church-wardens and overseers of a parish covenanted by deed "for themselves and for their successors" with a builder to pay for the repairs of the parish church. Then there was a proviso that nothing in the deed should be taken to extend to any "personal covenant" on the part of several covenantors or their estates in their private capacity, but only on the part of the church-wardens and overseers for the time being. The covenant being a personal covenant, it was held that the effect of the 550] proviso that the covenant should not be *a personal covenant was simply to destroy it: the proviso was repugnant to the covenant, and there was no way of reconciling the two things.

Chief Justice Tindal, in giving judgment, says (*): "Church-wardens and overseers, though they are by statute a corporate body for some purposes, cannot enter into such a covenant as this in a corporate character; and if not, then the contract must be a personal covenant. If it be, the next question is, what does it bind the defendants to do? At all events it binds them, while they remain in office, to pay." So he contemplates the covenant as a covenant in force while the covenantors remain in office. Then the other judges take the same view, and Justice Cresswell says (*): "I am of the same opinion. The defendants first enter into a clear personal covenant, and then they endeavor, by the proviso, to relieve themselves from all personal liability;"

(*) 5 Man. & G., 736; 6 Sott, N. R., 522.

(*) 5 Man. & G., 751.

(*) 5 Man. & G., 753.

not from some liability only, but from all liability. That agrees with what I have already said: a proviso limiting the personal liability under the covenant, that is, not destroying it, but leaving some personal liability still remaining, is a valid proviso: it is all incorporated into the covenant.

So much for the covenant. Now I come to the facts of the case.

[His Lordship then stated the circumstances under which Messrs. Champneys and Andrews became trustees of the building fund, and continued:] Messrs. Champneys and Andrews have got a site and are going to build a church. They have got a fund which, after allowing for the costs of obtaining the act of 1868, they assume to be ample for the purpose—a fund which they, as trustees, are bound to apply in accordance with the act. They are going to contract with a builder, and I am sorry to say the question before me is which of two innocent parties is to suffer.

The vicar and incumbent, who are the trustees of the fund, then contract with the builder for the building of a church. Now did they contract with the builder that he should build the church, and that they would pay for it? Nothing of the kind. The contract, which is dated the 23d of July, 1868, begins by reciting the act of 1868 and the intention to build a church; it then states the contract price to be £9,391, which is not to be paid by Champneys and Andrews simply, but by them “or the person or [55] persons for the time being entitled to apply the fund under the said act.”

Therefore the £9,391 was supposed to be a sum which was to come out of the fund. It is obvious that the framer of this instrument assumed that there would be a certain fund to provide the £9,391.

The agreement then goes on: “And the said W. W. Champneys and C. H. Andrews, to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid.” What does that mean? The object is to bind the fund. The agreement is not as accurately framed as it might have been, but what the covenantors mean to say is, that they bind the trustees of the fund so far as they are able to do so. They can bind themselves, as the trustees for the time being, because they have the charge of the fund, and have power to direct the destination of it.

But then the covenant goes on: “but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to

apply the same fund." That is a negative provision. What they mean to say is, "We as trustees bind the fund, but the moment we cease to be trustees we will not be liable for any breach of trust committed afterwards." That is the meaning of the covenant as I read it. It simply binds the fund, and makes the covenantors liable to apply the fund, but not in any event; for it does not make them liable to apply the fund the moment after they have ceased to be trustees. In that case the builder must proceed against the succeeding trustees.

Now Mr. Champneys ceased to be vicar of St. Pancras in June, 1869, he having been appointed Dean of Lichfield, and he ceased to be vicar before the church was finished, which was in June, 1870.

There was a second memorandum of agreement indorsed on the first, and bearing the same date, which was a contract for building the parsonage house. According to the act of 1868, the parsonage was to be built out of the surplus of the fund, and both parties, no doubt, thought there would be a surplus. Both agreements refer to specifications which contain what I am sorry to say specifications of this kind usually do contain, namely, a power for the architect to order alterations and additions; and it is provided *that the payments for any such alterations and additions are to be made "on the completion of the entire works." Therefore as there could be no payment for extras until the completion of the entire works, it is plain that no claim could in any case be made against Mr. Champneys until that time, that is to say, in June, 1870, that is a year after he had ceased to be vicar and trustee.

It is now attempted to make the estate of Mr. Champneys liable for the amount of these extras, that is, for an amount *ultra* the fund, and it is said that his estate is bound by these contracts. Now, I am satisfied that both parties perfectly understood what they were about when they executed these contracts, and that their intention was that Messrs. Champneys and Andrews should be bound only during the time they were trustees of the fund, and that they were not to incur any further liability. It appears to me that that intention is sufficiently expressed and that the restriction of their liability to the period of their holding office respectively as vicar and incumbent is a perfectly legal limitation of their liability. Liability under a contract may be limited in various ways; for instance, two persons contracting for payment of a sum of money may stipulate that they shall

each only be liable for half the amount. There is no law against such a limitation.

Assuming, therefore, as I do, that Mr. Champneys was not liable for the extras merely by reason of his being a trustee during the time he was vicar of St. Pancras, I am of opinion that his estate is not under any legal liability whatever under the contracts, and consequently I dismiss the action.

It is no doubt a hard case upon the plaintiff, but as the defendants are executors, the action must be dismissed with costs.

Solicitor for plaintiff: *I. H. Wrentmore*, agent for C. Waldron, Cardiff.

Solicitors for defendants: *Rose & Fry*.

See 9 Eng. Rep., 14 note; 16 Eng. Rep., 452 note; 18 Eng. Rep., 176 note; 18 Eng. Rep., 317 note; Bishop on Cont., §§ 356-367.

A government agent or public officer cannot be held personally liable, where the party with whom he deals is aware of such agency, and a promise by a sub-agent to pay when he receives money from his principal will not make him personally liable: *Brazelton v. Colyar*, 3 Baxter (Tenn.), 234; *Broadwell v. Chapin*, 2 Bradwell (Ills.), 511; *Parks v. Ross*, 11 How. U. S., 362; *Mann v. Richardson*, 66 Ills., 481; *Duncan v. Niles*, 82 Ills., 532; *Sanborn v. Neal*, 4 Wisc., 126; *Perry v. Hyde*, 10 Conn., 329; *Ogden v. Raymond*, 22 Conn., 379; *Osborn v. Kerr*, 12 Wend., 179; *Ryan v. Terrington*, 1 Tucker's Select Cas., Newfoundland, 29.

The general rule is, that if an agent of a known principal, in the course of his agency, signs a bill in his own name, he is liable, and his principal is not: *Johnson v. Boas*, 44 N. Y. Superior Court Rep., 16; *Rogers v. Coit*, 6 Hill, 822; *Crocker v. Colwell*, 59 N. Y., 213.

See *Burden v. Williamson*, 5 Hun, 560.

One purchasing goods for another makes himself personally liable, if he contracts in his own name, without disclosing his principal; and this, although the seller supposes the purchaser is acting as agent; it is not sufficient to clear the agent from liability

that the seller has the means of ascertaining the principal; he must have actual knowledge: *Cobb v. Knapp*, 71 N. Y., 348, affirming 42 N. Y. Superior Ct. Rep., 91.

A subsequent disclosure of the principals by defendant, the agent, and the commencement of an action against them by plaintiff, is not conclusive of an election to hold them only responsible; the fact of the commencement of such action, and the statements in the complaint, are proper to be considered by the jury on the question of knowledge as to the principals, but did not operate as a legal discharge: *Cobb v. Knapp*, 71 N. Y., 348, affirming 42 N. Y. Superior Ct. Rep., 91, and distinguishing *Waddell v. Mordacal*, 3 Hill (So. Car.), 22; and *Southwell v. Bowditch*, 16 Eng. Rep., 447, 17 id., 324.

To same effect, *Mattlage v. Poole*, 15 Hun, 556.

Though if the creditor, knowing the facts, proceed to judgment against either the principal or the agent, he is precluded by his election, and cannot proceed against the other: *Mattlage v. Poole*, 15 Hun, 556, distinguishing several cases and citing with approval *Curtis v. Williamson*, 11 Eng. Rep., 149.

See also *Burden v. Williamson*, 5 Hun, 560.

Though, ordinarily, when an undisclosed principal is discovered, he also is liable to the creditor: *Engle v. Greenbaum*, 2 Hun, 136; *Meeker v. Clag-*

horn, 44 N. Y., 849; *Mattlage v. Poole*, 15 Hun, 558; *Inglehart v. Thousand Islands, etc.*, 7 Hun, 547.

See *Travis v. Scriba*, 12 Hun, 391; *Warner v. Miller*, 13 Hun, 654.

A promissory note in this form, "One year after date we promise to pay to the order of A. B. one thousand dollars value received," and signed, "George Moore, Treasurer of Mechanic Falls Dairying Association," is the note of Moore and not of the association, notwithstanding the use of the plural "we" instead of the singular "I": *Mellen v. Moore*, 68 Maine, 390.

Canada, Upper: *Haggerty v. Squier*, 42 U. C. Q. B., 165.

Canada, Lower: *Kerr v. Brown*, 23 L. C. Jur., 227.

Illinois: *Trustees v. Rantenberg*, 88 Ills., 219.

Indiana: *Hayes v. Matthews*, 63 Ind., 412; *Mears v. Graham*, 8 Blackf., 144.

Maine: *Mellen v. Moore*, 68 Maine, 390; *Treat v. Smith*, 68 Maine, 394.

Massachusetts: *Forster v. Fuller*, 6 Mass., 58; *Fisher v. Eldredge*, 12 Gray, 474; *Seam v. Coburn*, 10 Cush., 324.

New York: *Peck v. Gardner*, 9 Hun, 704; *Merchants' Bank v. Hayes*, 5 Hun, 590; *Barker v. Mechanic, etc.*, 8 Wend., 94; *Hovey v. Banister*, 8 Cow., 31; *Moss v. Livingston*, 4 N. Y., 208; *De Witt v. Walton*, 9 N. Y., 571.

Pennsylvania: *Ulam v. Boyd*, 87 Penn. St. Rep., 477; *Quigley v. De Haas*, 82 Penn. St. Rep., 267.

Though if, from the entire paper, it clearly appears that the person signing it intended to do so only as the agent of a known and disclosed principal, he is not personally liable.

Canada, Upper: *Bank v. Harrington*, 28 U. C. Com. Pl., 488.

Connecticut: *Johnson v. Smith*, 21 Conn., 627, explained *Fisher v. Eldredge*, 12 Gray, 476.

Illinois: *King v. Handy*, 2 Bradwell, 212; *Little v. Bailey*, 87 Ills., 239.

Massachusetts: *Rice v. Gove*, 22 Pick., 158; *Long v. Colburn*, 11 Mass., 97; *Mann v. Chandler*, 9 Mass., 335, explained *Fisher v. Eldredge*, 12 Gray, 476.

See *Forster v. Fuller*, 6 Mass., 58; *Fisher v. Eldredge*, 12 Gray, 474.

New York: *Green v. Skeel*, 2 Hun, 485, distinguishing *De Witt v. Walton*, 9 N. Y., 571; *Hood v. Hallenbeck*, 7 Hun, 363; *Moore v. McClure*, 8 Hun, 557; *Walbridge v. Kilpatrick*, 9 Hun, 135.

See *Merchants' Bank v. Hayes*, 7 Hun, 530.

United States Supreme Court: *Mechanics' Bank v. Bank of Columbia*, 5 Wheat., 326, 337.

An instrument in the form of a promissory note, beginning "We, as trustees, and not individually, promise to pay," and signed, "A., B. and C., trustees," purported on its face to be secured by a mortgage of real estate. A., B. and C. were trustees of a land association, and purchased of the promisee a parcel of land, the deed of which ran to them as trustees of the association, and set forth their powers. They mortgaged the land to the grantor, and gave the above instrument, secured by the mortgage, in part payment of the purchase money. Held, in an action against the makers of the instrument, by an indorsee, who took it after maturity, they were not personally liable thereon: *Shoe, etc., v. Dix*, 123 Mass., 148.

Where plaintiffs sought to recover on a lease which, on its face, purported to be made by "J. Romaine Brown, agent, party of the first part," and which was signed by him under seal, and there was nothing in the lease to show that Brown was acting as their agent in the premises, or that they were in any way interested in the letting; held, that plaintiffs, although the owners of the property, could not recover on such lease, without declaring on and proving an assignment from Brown: *Schaffee v. Henkel*, 57 How., 97, Court Appeals; *Briggs v. Partridge*, 64 N. Y., 357.

But see *Taintor v. Prendergast*, 3 Hill, 72; *Huntington v. Knox*, 7 Cush., 371; *Alexander v. Barker*, 2 Crompt. & Jervis, 183, distinguished in *Burns v. Barrow*, 61 N. Y., 39.

Where A. guaranties to B. payment for goods to be sold to C., he is not liable to a firm of which B. is a member for goods sold to C.: *Burns v. Barrow*, 61 N. Y., 39.

It is a well settled principle of law, that if goods are sold by a factor or agent in his own name, without dis-

closing his principal, the purchaser has a right to *set off a debt due from the agent*, in an action by the principal for the price of the goods: *Judson v. Stillwell*, 26 How. Pr., 513; *Huntington v. Knox*, 7 Cush., 871.

But where the purchaser has *good reason to believe* that the vendor is acting as agent of some other person in making the sale, he will not be entitled to the benefit of a set off of his demand against the agent. And a mere *general notice*—such as that the purchaser knew by report that the vendor was selling goods for another, or doing business in somebody else's name, or that he was acting as agent—is sufficient to deprive the purchaser of a set off against the agent: *Judson v. Stillwell*, 26 How. Pr., 514; *Huntington v. Knox*, 7 Cush., 871.

If a person makes a written contract for the sale of lands as the agent of the owner, although without authority, the owner may adopt it and make it his own, and the ratification will relate back to the act done: *Roby v. Cossit*, 78 Ills., 638.

Though the proof of the authority of the agent or of the ratification of his acts should be clear and specific: *Proudfoot v. Wightman*, 78 Ills., 553.

If one professing to act as the agent of A. makes a contract for the sale of land, an expression of willingness by A., the owner, to carry out its terms, cannot be held a ratification of the contract. It is a mere promise to sell on the same terms, and is not enforceable under the statute of frauds, unless reduced to writing and signed by the owner or by some one by him lawfully authorized: *Roby v. Cossit*, 78 Ills., 638.

A bill for the specific performance of a contract of sale made by an agent, which fails to show that the person executing the same was the agent of the owner, duly authorized, either by any charge, or by the contract so far as it is set out, is bad on demurrer: *Roby v. Cossit*, 78 Ills., 638.

It may be stated as a general rule that, as between maker or indorsee and the holder, oral evidence that at the time a note was delivered the payee agreed with the maker or indorser that he should not be required to pay it, or that upon the happening of any given contingency it should not be enforced

is inadmissible, for the reason that the contract of the maker or indorser being in writing parol evidence to vary, effect, or contradict it is inadmissible. See 12 Eng. R., 248-6; 18 Eng. R., 176 note.

Alabama: *Beard v. White*, 1 Ala., 436.

Colorado: *Martin v. Cole*, 3 Col., 113.

Connecticut: *Fairfield, etc., v. Thorp*, 13 Conn., 173, 181.

See *Case v. Spaulding*, 24 Conn., 577.

English: *Hoare v. Graham*, 3 Camp., 56; *Foster v. Jolly*, 1 Crompt., Mees. & Rosc., 703.

Iowa: *American, etc., v. Clark*, 47 Iowa, 671, 674.

Kansas: *Doolittle v. Ferry*, 20 Kans., 280.

Maine: *Cunningham v. Wardwell*, 12 Maine, 466; *Warren v. Sterrett*, 15 Maine, 443.

Massachusetts: *Barnstable, etc., v. Ballou*, 119 Mass., 487; *Davis v. Randall*, 115 Mass., 547; *Thomp. National Bank Cas.*, 600; *Wright v. Morse*, 9 Gray, 337; *Allen v. Furbish*, 4 Gray, 504; *Trustees v. Stetson*, 5 Pick., 506; *Adams v. Wilson*, 12 Metc., 438; *West, etc., v. Thompson*, 124 Mass., 506.

Missouri: *Rodney v. Wilson*, 67 Mo., 123, 125.

New York: *First National, etc., v. Tisdale*, 18 Hun, 151; *Ely v. Kilborn*, 5 Den., 514; *Burhans v. Carter*, 13 Hun, 153, 156; *Brown v. Hull*, 1 Den., 400; *Erwin v. Saunders*, 1 Cow., 249; *Payne v. Ladue*, 1 Hill, 116; *Gridley v. Dole*, 4 N. Y., 486; *Crater v. Benninger*, 45 N. Y., 545; *Farmers, etc., v. Whinfield*, 24 Wend., 418; *Eaves v. Henderson*, 17 Wend., 190; *Thompson v. Hall*, 45 Barb., 214; *Lewis v. Jones*, 7 Bosw., 366, 371, distinguishing cases; *Wilson v. Deen*, 74 N. Y., 531, 535; *Colwell v. Lawrence*, 38 N. Y., 71; *Porter v. Spence*, 88 N. Y., 119; *McCurie v. Stevens*, 13 Wend., 527; *Eggleston v. Knickerbacker*, 6 Barb., 458.

Some cases seem to recognize a difference between maker and holder and indorser and indorsee: *Bruce v. Wright*, 3 Hun, 548.

Ohio: *Holzworth v. Koch*, 26 Ohio St., 33.

Pennsylvania: So held as to negotiable paper: *Hanes v. Patterson*, 84

Penn. St. R., 274; *Brown v. Scanlan*, 1 Leg. Chron. R., 381; *Hoopes v. Beal*, 8 Reporter, 472.

It is said in *Wilson v. Deen*, 74 N. Y., 534, that in Pennsylvania the rule, except in commercial paper, is different, citing *Christ v. Dittenbach*, 1 Serg. & Rawle, 446; *Thompson v. White*, 1 Dal., 424; *Oliver v. Oliver*, 4 Rawle, 141.

See also *Powelson v. McShane*, 2 Leg. Chron. R., 177; *Hoopes v. Beale*, 8 Reporter, 472.

Tennessee: In this state the contrary rule is held: *Bissenger v. Guite-man*, 6 Heisk., 277.

United States Supreme Court: *U. S. v. Dunn*, 6 Peters, 51; *Renners v. Bank*, etc., 9 Wheat., 587; *Bank v. Jones*, 8 Peters, 12; *Henderson v. Anderson*, 3 How., 73; *Brown v. Wiley*, 20 How., 442; *Specht v. Arnard*, 16 Wall., 564; *Forsythe v. Kimball*, 91 U. S. R., 291.

Vermont: *Farnham v. Ingham*, 5 Verm., 514; *Isaacs v. Elkin*, 11 Verm., 679.

Virginia: *Martin v. Lewis*, 30 Gratt. (Va.), 672, 683, and cases cited.

Wisconsin: *Foster v. Clifford*, 44 Wisc., 569, 571-3; *Charles v. Davis*, 42 Wisc., 56.

In *Doolittle v. Ferry* (20 Kans., 230) the court (p. 235) says, "The case of *Davis v. Brown* (94 U. S. R., 423, cited 18 Eng. R., 176 note) does not conflict with the views herein expressed, for there the evidence was of a contemporaneous written agreement." In that case (p. 427) the court said, "The agreement being in writing, is to be taken and considered in connection with the indorsement, and the two are to be construed together."

The same may be said of *Brown v. Spofford*, 95 U. S. R., 474.

Evidence will not be received for the purpose of showing that a payee of a promissory note, who has transferred it by an indorsement in blank, verbally agreed, at the time of making the indorsement, to assume an absolute and unconditional liability, and not the liability simply of an indorser: *Rodney v. Wilson*, 67 Mo., 123.

See 12 Eng. R., 246 note; 16 Eng. R., 453 note; 18 Eng. R., 176 note.

While it is true that an indorsement in blank, in the absence of any proof of a different contract, implies an obli-

gation to pay only when notice of protest is duly given the indorser, yet he may, by his agreement, enlarge his liability, and it is competent, upon the trial, to show by parol evidence the nature and extent of his understanding.

Blum made his note payable to plaintiff; defendant indorsed his name on the back of it. Plaintiff, who was present, preferred he should write on the face as surety—defendant assured plaintiff his liability would be the same as if his name was on the face.

Held, defendant was not entitled to notice of non-payment: *Iser v. Cohen*, 1 Baxter (Tenn.), 421.

Parol evidence is admissible to show that a note was delivered upon a condition which has not been performed: *Seymour v. Cowing*, 4 Abb. Ct. App. Dec., 200; *Brackett v. Barney*, 28 N. Y., 333; *Bookstaver v. Janes*, 60 N. Y., 146.

A failure of consideration of a note may, as between the parties, be shown—as that a note was given for certain property which was never delivered: *Sawyer v. Chambers*, 43 Barb., 622; *Sugg v. Orndoff*, 7 Heisk. (Tenn.), 167.

In an action by the holder of negotiable paper against the immediate indorser, the title of no innocent third party intervening, it is always competent to the defendant to show by parol evidence either the want or failure of consideration, as between himself and the plaintiff, or that the indorsement was procured by fraud, or that it was made upon some special trust, or for a special purpose, as to an agent to enable him to use the paper or the money in some particular way or to make collection, or have the paper discounted for the benefit of the principal; or that the note was indorsed and delivered to the plaintiff to be used only upon some express condition that has not been complied with. In these and similar instances, the parol evidence is admitted to show the absence of any valid or sufficient consideration for the alleged liability of the defendant to the plaintiff, and its admission violates no principle established for the protection of third persons as *bona fide* holders of negotiable paper: *Hamburger v. Miller*, 48 Md., 317.

If the defendant claim the note was without consideration, the holder may show the transaction between the par-

ties to show the note was founded on a valid consideration, and what that was: *Smith v. Sergeant*, 67 Barb., 243; *Holzworth v. Koch*, 26 Ohio St., 33; *Perry v. Hill*, 78 N. C., 417.

See *Smyth v. Strader*, 4 How. (U.S.), 405; *Seymour v. Cowing*, 4 Abb. Ct. App. Dec., 200.

Evidence of a conversation at the making of a note is admissible to show fraud on the part of the payee by a misreading of the paper, or of any paper connected with the transaction: *Farmers, etc., v. Whinfield*, 24 Wend., 418.

So, in an action to recover on a note given for services, the maker may recoup for a negligent performance of the work not taken into account, or settled when the note was given: *Al-laire, etc., v. Guion*, 10 Barb., 55.

Oral evidence is admissible, as between parties to a note, to show that one was a surety for another, or that they were co-sureties, in order to admit a defence growing out of the relation of principal and surety: 11 Eng. Rep., 41 note; 17 Eng. Rep., 183 note; 18 Eng. Rep., 176 note; 19 Eng. Rep., 301 note.

Illinois: *Robertson v. Deatherage*, 82 Ills., 511.

Indiana: *Nurre v. Chittenden*, 56 Ind., 462.

New York: *Hubbard v. Gurney*, 64 N. Y., 457; *Wells v. Miller*, 66 N. Y., 235.

Thompson v. Hall, 45 Barb., 214, is clearly not good law on this subject.

Ohio: *Oldham v. Broom*, 28 Ohio St., 41.

So, though partners sign a note individually, an indorser may show by oral evidence that one partner induced him to do so by representing it was in fact a partnership debt, and the firm are bound by the representations of such partner: *McKee v. Hamilton*, 33 Ohio St. R., 7.

Though one indorsing does not become a surety for a previous indorser, simply because the maker agreed to get him to indorse as a co-surety, if such indorser did not know of the agreement when he indorsed: *Fisken v. Meehan*, 40 U. C. Q. B., 146; *Oldham v. Broom*, 28 Ohio St. R., 41; *Nurre v. Chittenden*, 56 Ind., 462.

In assumpsit by the indorsee of a negotiable note against an indorser, the

defendant pleaded in bar two special pleas. The first plea set forth an agreement between the parties, that if the defendant would sell a certain machine to H., and take his note for it, and would indorse the note to the plaintiff without recourse for collection, the plaintiff would purchase the note of the defendant at an agreed rate of discount; that the defendant, in pursuance of this agreement, sold the machine to H., and took from him the note in suit, which he sold to the plaintiff, and at his request indorsed without restriction, the plaintiff agreeing to look to the maker alone for payment and not to hold the defendant upon his indorsement.

The second plea set forth a similar agreement between the parties for the sale and indorsement of the note made after the sale of the machine to H., and a sale and indorsement under a similar agreement by the plaintiff to hold the note on the credit of the maker alone. Held, that the antecedent agreement alleged in the first plea created such an equitable relation between the parties in respect to the indorsement without restriction, that the defendant was, in effect, an accommodation indorser, and that such agreement could be proved under the rule recognized in such an excepted class of cases in *Dale v. Gear*, 38 Conn., 15, and that the second plea was insufficient: *Dale v. Gear*, 39 Conn., 89.

In an action brought to recover the proceeds of goods sold by defendant as agent, he set up as a counter-claim his employment by plaintiff's assignors to sell on commission, with an agreement on their part that his commissions should not be less than \$1,500. Plaintiff in reply produced a written agreement, drawn up by defendant, and signed by plaintiff's assignors, in substance giving defendant the sole and exclusive right to sell their goods for a specified commission, but containing no guarantee as to the amount of commissions. Defendant thereupon gave evidence in substance that the writing was executed, not as the contract between the parties, but to enable defendant to procure advances upon the goods, and was delivered to the person making the advances. Held, that the evidence was proper; and that the decision of the referee holding the

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writing not to be the contract between the parties was sustained thereby: *Grierson v. Mason*, 60 N. Y., 394.

The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed, by the plaintiff. Held, in a suit on the note, that parol evidence was admissible on the part of the defendant to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defen-

dant that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid: *Schindler v. Muhleiser*, 45 Conn., 153.

An oral agreement, made *after* the giving of a note, that a certain indebtedness or other paper shall be applied in payment of the note, is valid and may be shown: *Eaves v. Henderson*, 17 Wend., 190; *Clark v. Scott*, 45 Cal., 86.

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*MILDMAY V. QUICKE.

[1875 M. 80.]

Partition Action—Married Woman's Real Estate—Sale—Purchase-money—Reconversion—Partition Act, 1868, s. 8—Solicitors—Charging and Stop Orders for Costs—Attorneys and Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28—Appearance by Counsel—Costs.

By the decree in a partition suit a sale was directed of certain real estate, of which seven-eighths belonged to the plaintiff and one-eighth to the defendant, Mrs. Q., a married woman, in fee. The plaintiff having subsequently offered to purchase Mrs. Q.'s share, an order was made in chambers, on the application of all parties, directing that, Mr. and Mrs. Q. accepting £1,200 as the purchase-money for Mrs. Q.'s one-eighth, the plaintiff should pay the amount into court, which he did; but before any conveyance was executed Mrs. Q. died, leaving two infant daughters her co-heiresses. Mr. Q. took out administration to her estate:

Held (applying the principle in *Foster v. Foster* ⁽¹⁾), that the £1,200 must be treated as realty by force of sect. 8 of the Partition Act, 1868, incorporating sects. 23 to 25 of the Leases and Sales of Settled Estates Act, and therefore belonging to the co-heiresses, subject to Mr. Q.'s life interest as tenant by the curtesy.

Mrs. Q.'s solicitors obtained a charging order on the fund for their costs in the action under the Attorneys and Solicitors Act, 1860, s. 28, and afterwards a stop order. Having been served with proposed minutes of order on further consideration, they appeared by counsel and asked for their costs of obtaining the stop order and of their appearance:

Held, that they must bear their own costs of obtaining the stop order and of their appearance.

(1) 1 Ch. D., 588.

[6 Chancery Division, 556.]

M.R., June 30, 1877.

***In re INTERNATIONAL PULP AND PAPER COMPANY. [556]**

KNOWLES' MORTGAGE.

Company—Winding-up—Director—Mortgage—Non-registration—Sub-mortgages of Director—Companies Act, 1862, s. 43.

A company mortgaged freehold and leasehold property to K., one of their directors, who then sub-mortgaged it to H., a stranger, but neither of the securities was registered under sect. 43 of the Companies Act, 1862, the company never having kept a register of securities. K. took possession under his mortgage, and the company was afterwards ordered to be wound up. The title deeds of the property were in H.'s possession.

A summons by the official liquidator that K. and H. might be ordered to deliver up possession of the property and title deeds, was dismissed with costs.

Observations on *Ex parte Valpy & Chaplin* (¹) and *In re Native Iron Ore Company* (²).

ADJOURNED SUMMONS. The International Pulp and Paper Company, Limited, being desirous of purchasing certain freehold and leasehold property *consisting [557 of mills and premises at Clondalkin, in Ireland, borrowed for the purpose, under their articles of association, the sum of £15,000 from the Crédit Foncier of England, and by an indenture dated the 3d of July, 1874, the company mortgaged the property to the Crédit Foncier as security for the £15,000.

By an indenture dated the 31st of July, 1875, to which the company was a party, the Crédit Foncier transferred the mortgage to John Knowles, a director of the company, in consideration of his having, at the request of the company, repaid the £15,000 to the Crédit Foncier.

By another indenture of the same date the company gave Knowles a further charge on the property for advances to them beyond the £15,000.

The total sum lent by Knowles to the company amounted to £17,500, which he had in fact borrowed for the purpose from one Haworth, who had no connection with the company, and by an indenture dated the 21st of October, 1875, Knowles sub-mortgaged the property to Haworth as security for the amount, according to an arrangement between them.

In the previous month of August Knowles had taken possession of the property under his mortgage.

(¹) Law Rep., 7 Ch., 289.

(²) 2 Ch. D., 345; 16 Eng. Rep., 779.

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The company ultimately became insolvent, and on the 4th of December, 1875, was ordered to be wound up on their own petition, their only assets being the mills and premises comprised in the securities. Knowles still continued in possession of the property, but the title deeds were in Haworth's possession.

It appeared that none of the securities had been registered in accordance with the 43d section of the Companies Act, 1862 ('), and that in fact the company had never kept any register of mortgages or charges. Knowles, however, stated in evidence that at a meeting of the directors held on the 558] 29th of October, 1875, at *which he was present, the company's solicitors instructed the managing director at once to prepare a proper register of securities, and that it was not until after the winding-up order had been made he discovered that no such register had been kept.

Under these circumstances, the official liquidator now applied, by summons, for an order that Knowles and Haworth should forthwith deliver up possession of the property and title deeds.

Davey, Q.C., and *Solomon*, for the official liquidator: We rely upon *Ex parte Valpy & Chaplin* ('), and *In re Native Iron Ore Company* ('), where it was held by the Court of Appeal that no director or other person standing in a fiduciary relation towards a company can set up as against the creditors of the company a mortgage or charge held by him of the company's property, unless such mortgage or charge has been duly registered under the 43d section.

[JESSEL, M.R.: With the greatest possible respect for the Court of Appeal, I must say that those decisions do not commend themselves to my mind, and though I am bound to follow them in a precisely similar case, I shall not extend the rule.]

The rule is also laid down by Vice-Chancellor Malins in *In re Wynn Hall Coal Company* (') and *In re General Prov-*

(1) Sect. 43 of the Companies Act, 1862, enacts that "Every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any

property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding fifty pounds."

(2) Law Rep., 7 Ch., 289.

(3) 2 Ch. D., 345; 16 Eng. R., 779.

(4) Law Rep., 10 Eq., 515.

ident Assurance Company(¹). An unregistered mortgage to a director is not necessarily void, but the mortgagee is in this position, that he cannot avail himself of it as against the general body of creditors: *Ex parte Valpy & Chaplin*. It was Knowles' duty, as a director, to see that both the mortgage and sub-mortgage were duly registered, and as to Haworth he took with constructive notice that Knowles' mortgage was one which could not be set up against the company's creditors, and he cannot be in a better position than Knowles himself.

Chitty, Q.C., and *J. P. Lake*, for Haworth, and *Marten*, Q.C., and *F. H. Colt*, for Knowles, were not called upon, but,

Chitty, Q.C., mentioned *In re Borough of Hackney Newspaper Company*(²), where his Lordship questioned [559 the decision in *Ex parte Valpy & Chaplin*(³); and also referred, upon the question as to the validity of an unregistered mortgage, to the following passage in *Chitty on Contracts*(⁴): "Nor will a contract, which was not illegal when made, become illegal by relation; although the party making it was bound by law, under a penalty, to do a subsequent act which he has neglected to do": *Eyre v. Shelley*(⁵).

JESSEL, M.R.: It is very dangerous for a judge who does not agree with particular decisions, to deal in distinctions from those decisions. Now I will not attempt to distinguish this case from the cases before the Court of Appeal which have been cited, but I will say this, that I do not consider them absolutely binding upon me in the present instance; and for this reason, that as I do not know the principle on which the Court of Appeal founded their decisions, I cannot tell whether I ought to follow them or not. If those decisions do lay down any principle I am bound by it, but I have not the remotest notion what that principle is.

As I understand those decisions, the Court of Appeal has decided that where a mortgage of the company's property to one of its directors or officers is omitted to be registered, that director or officer cannot avail himself of it as against creditors of the company. I must confess that I cannot understand why that should be the result. The 43d section of the act says that "Every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register, in respect of each mortgage or charge, a

(¹) Law Rep., 14 Eq., 507, 514, 515.

(²) 3 Ch. D., 669; 18 Eng. R., 751.

(³) Law Rep., 7 Ch., 289.

(⁴) 10th ed., p. 642.

(⁵) 6 M. & W., 269; 1 Sm. L. C., 7th ed., p. 397.

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short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge."

Now, of course the entry on the register cannot be made until after the mortgage is made, and a reasonable time must be allowed to elapse before such entry can be made, for the entry cannot be made at the same moment as the mortgage: so that if the mortgage is void at all, it is void by reason of omission to register, that is, it is avoided by relation; but, as I understand the law, you cannot avoid a contract in that way. If a contract is void, it is through its being originally an illegal contract. The act does not say that in case of omission to register the mortgage it shall be void. The act imposes a penalty and nothing else, and it is a well known principle that where an act of Parliament imposes a penalty on the doing or omitting to do a particular thing, that is the only penalty. According to that principle the penalty for the omission to register is a penalty not exceeding £50, whereas I am asked, on the authority of the decisions of the Court of Appeal, to impose a penalty in this case of £17,500, for those decisions say that the penalty for the omission to register is the loss of the security.

Not being at liberty to guess what the principle of those decisions is, I must follow them if I have a precisely similar case before me, but I am only bound to follow them in a precisely similar case. What, then, are they?

I will first take the case of *Ex parte Valpy & Chaplin* (1), which was the case of a solicitor employed by a company omitting to register a charge given by them to him. Lord Justice James says: "Every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the Legislature; and I am of opinion that the failure of the appellant to do so is fatal to his case. It makes no difference that he was not the regular solicitor of the company; he acted as their solicitor in this matter; it was therefore his duty to see that, so far as this particular transaction was concerned, the register was properly kept."

With the greatest respect for the learned Lord Justice, I do not see that. I do not see how a solicitor, not being the regular solicitor of the company and not having the control of the register, is bound to see that the necessary entry is made.

(1) Law Rep., 7 Ch., 289, 291.

The second case is *In re Native Iron Ore Company* ('). Lord Justice Mellish there says: "It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company and omits to register it in accordance with the act, the consequence is that he *has no charge as against [561] the creditors The rule so established is, in my opinion, founded on a perfectly good equitable principle." Then Lord Justice Baggallay, after expressing his concurrence and adopting the language used by Lord Justice James in *Ex parte Valpy & Chaplin*, says ('): "So in the present case the duty of these directors was to see that their debenture was registered according to the provisions of the act, which are strict, distinct, and precise."

I should have thought that the penalty for not doing so was equally distinct and precise, and that if the invalidation of the mortgage had been the penalty intended to be imposed, the act would have said so. However, it seems I am wrong, because there are two decisions of the Court of Appeal the other way. The rule laid down by them, and which we are to follow, is, that directors or officers of a company advancing money on the security of the company's property cannot set up the mortgage against the company's creditors unless it is registered. If there is any principle in those decisions at all it is not that want of registration makes the mortgage void—for Lord Justice James, in *Ex parte Valpy & Chaplin*, admits that it does not—but that there is some personal equity against a director or officer of a company which prevents him from setting up such a mortgage himself; but, as I understand, that principle, if it exists at all, does not apply to any person claiming under or through a director or officer, but only to the director or officer himself.

Now in this case the director was in reality nothing more than a bare trustee, having sub-mortgaged to Haworth. Why Haworth should have his security destroyed because Knowles omitted to have his mortgage registered, I am at a loss to understand. Haworth was neither a director nor an officer of the company, and the Court of Appeal has decided that it is only a director or officer who cannot set up an un-registered mortgage against the creditors of the company. The cases I have referred to are therefore not applicable to Haworth, and consequently, as the legal decisions do not stand in my way, I dismiss the summons, with costs.

Solicitors: *Keighley, Shea & Bevan; Bower & Cotton.*

(') 2 Ch. D., 345, 346; 16 Eng. R., 779.

(?) 2 Ch. D., 347.

[6 Chancery Division, 562.]

M.R., July 28, 1877.

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*JOB V. JOB.

[1875 J. 28.]

Executor—Delivery of Assets to Third Party—Loss of Assets—Gratuitous Bailee—Liability—Charging Wilful Default—Accounts—Conflicting Rules in Law and Equity—Judicature Act, 1873, s. 25, subs. 11.

Where the assets of a testator have come into the possession of the executor and are afterwards lost to the estate, the rule at law as well as in equity now is, that the executor stands in the position of a gratuitous bailee, and therefore cannot be charged without some wilful default: Judicature Act, 1873, s. 25, subs. 11.

Semble, in an administration action under the new practice, an order charging an executor with wilful default may, in a proper case, be made at any time during the progress of the action.

FURTHER consideration. The bill in this case, filed in March, 1875, was for the administration of the estate of a testator, Joseph Job, watchmaker, who died in September, 1872.

Shortly after the testator's death, the defendant, who was the acting trustee and executor and also one of the residuary legatees under the will, intrusted part of the testator's stock-in-trade to his, the defendant's, son James Job, a watchmaker and jeweler, for realization in the ordinary course of trade. James Job subsequently became bankrupt, whereupon his trustee took possession of and sold the stock-in-trade then in his hands, including part of the testator's, to the value of £160, which thus became lost to the testator's estate.

A decree for the administration of the testator's estate was made on the 13th of January, 1876, and various accounts and inquiries were directed, including an account of personal estate not specifically bequeathed come to the hands of the defendant, but no charge of wilful default was made against him by the decree. In taking the accounts, the plaintiff, one of the residuary legatees, sought to charge the defendant with the £160, but the Chief Clerk disallowed the claim, as no evidence was adduced to show that the defendant had ever proved for the amount against James Job's estate.

563] *The cause now came on upon further consideration, the main question being whether the defendant was chargeable with the loss of the £160.

Chitty, Q.C., and *Cozens-Hardy*, for the plaintiff: An executor is chargeable for the goods of his testator if he fails properly to dispose of them, and if he has once received the

goods and they are lost, he cannot escape liability unless he can show he has properly discharged himself.

Davey, Q.C., and *Chester*, for the defendant: An executor cannot be charged with wilful default when the decree does not so charge him. Here we acted *bona fide* and according to what we believed to be the best mode of realizing the property, and the rule in equity is, that if an executor accidentally loses the goods of his testator he is not chargeable with them as assets; *Williams on Executors* (¹); *Jones v. Lewis* (²); though the rule seems to be otherwise at law: *Crosse v. Smith* (³).

JESSEL, M.R.: What is the rule in equity? I agree that in *Crosse v. Smith* it was laid down that an executor is liable at law for the loss of his testator's assets when they have once come into his hands; but if that is in conflict with the law of a court of equity, equity must now prevail. The real question then is, what is the rule in equity? Now I refer to *Jones v. Lewis* (⁴), where a common decree was made against an administratrix for an account. Part of the assets had been delivered by her to her solicitor, who was robbed, and it was held that she was not to be charged. Lord Hardwicke said, "If a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them (the goods) so as he would keep his own. So it is as to an executor or administrator, who is not to be chargeable further than goods come to his hands; and for these not to be charged, unless guilty of a *devastavit*; and if robbed, and he could not avoid it, he is not to be *charged, [564 at least in this court." That is an old case, and, as far as I know, it has been always followed.

I will now take a modern authority. In *Williams on Executors* (⁵) the law is thus stated: "Again, upon the supposition that goods come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands. There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands, unless they were taken by the Queen's enemies. But it should seem, at least in a court of equity, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is that he is not to be charged, without

(¹) 7th ed., pp. 1668, 1807.

(²) 2 Ves. Sen., 240.

(³) 7 East, 246.

(⁴) 2 Ves. Sen., 240, 241.

(⁵) 7th ed., p. 1668.

some default in him. Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not, in equity, be charged with these as assets." Then, at p. 1807, the learned author refers to the passage I have read, and quotes a passage from Lord Ellenborough's judgment in *Crosse v. Smith* (¹), showing the rule at law to be that an executor was liable for the loss of assets once come into his hands. The rule there laid down is, however, as I have already intimated, not the rule now, even at law, for the Judicature Act, 1873, provides by sect. 25, sub-sect. 11, that where "there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." The rule, then, at law as well as in equity, now is that an executor or administrator is in the position of a gratuitous bailee, who cannot be charged with the loss of his testator's assets without wilful default; and a further rule is that though he is liable in equity in case of wilful default, he cannot be charged with it unless an account is ordered against him on that footing: you cannot charge him with wilful default without making out a case; and therefore, under the old practice, unless wilful default was charged in the bill, you could not so charge him in the accounts. I think, however, that under the new practice an order charging him with wilful default may be made at any time on a proper case being made.

565] *The present case stands simply thus: On the death of the testator, who was a watchmaker, his executor delivered part of his stock-in-trade, to the value of £160, to his son James Job, who was also a watchmaker and jeweler, for the purpose of being sold in the ordinary course of trade. James Job became bankrupt, and his trustee then took possession of all his stock-in-trade, including the goods of the testator, and sold the whole, as being within the order and disposition of the bankrupt.

Now, if that was right on the part of the trustee, it could only be so through James Job having mixed up the testator's goods with his own stock-in-trade; and I must take it that he did mix them up with his own stock-in-trade, and therefore that the trustee was entitled to sell. On that presumption the executor was not liable for allowing the trustee to sell; and if, on the other hand, the trustee was wrong,

(¹) 7 East, 246, 258.

you cannot charge the executor for not suing the trustee. Taking it either way, the executor is not, in my opinion, liable for wilful default.

Solicitors: *G. Cheesman*, agent for Phillips & Cheesman, Hastings; *Wright, Bonner & Wright*, agents for W. Cammack, Hastings.

See 22 Eng. Rep., 300 note; 1 Life Benjamin R. Curtis, 371.

For a case deciding many points as to liability of a trustee for investing trust funds, etc., see *Foscue v. Lyon*, 55 Ala., 440.

Where an executor, in 1865, applied to the court and obtained an order authorizing him to invest money in his hands, as such, which he had held since 1860, in Confederate bonds, held that the statute did not authorize the investment of the fund in his hands, which was in fact good money, in Confederate bonds, and he was liable to make good the loss.

Also, that where he invested other funds in his hands, as such, in his own name, he could not charge the estate with such investment if lost, though he intended to hold the investment for the estate: *Carter v. Dulaney*, 30 Gratt. (Va.), 192.

Though as to investment in such bonds in Alabama, see *Foscue v. Lyon*, 55 Ala., 440.

Where a trustee pays trust funds into bank in his own name it remains stamped with the trust, and so long as it can be traced it will be held to be subject to the trust: *Shaw v. Bauman*, 34 Ohio St. R., 30-31; *Sadler's Appeal*, 87 Penn. St. R., 154.

A trustee in a deed of trust has the undoubted right to employ an auctioneer to sell the lands conveyed, and if he is present at the sale, directing and controlling it, this will be a compliance with the terms of the power of sale, and will satisfy the demands of the law: *McPherson v. Sanborn*, 88 Ill., 150, and see cases cited in note as to how far a trustee may, and how far may not, delegate the power conferred upon him.

The time allowed for the investment of trust moneys should be such as each particular case shows to be reasonable: *Wetmer's Appeal*, 87 Penn. St. R., 120.

Trustees in Pennsylvania are not liable beyond what they actually re-

ceive, except in cases of gross negligence: *Wetmer's Appeal*, 87 Penn. St. R., 120.

Trustees are not responsible where, observing statutory provisions relating to investments, they deal with moneys intrusted to them in good faith, as men of ordinary prudence and sagacity deal with their own property: *Wetmer's Appeal*, 87 Penn. St. R., 120; *Roosevelt v. Roosevelt*, 6 Abb. N. C., 447.

Where a trustee made a compromise without leave of the court, and it appeared that it was just, fair, proper and for the best interests of the estate, the court sustained it: *Pool v. Dial*, 10 S. C., 440.

The fact that trustees allow investments which they would not be allowed to make, made by the person creating the trust to stand, is a circumstance which may be taken into account in determining whether they were guilty of negligence in managing the estate: *Foscue v. Lyon*, 55 Ala., 440.

See *Adair v. Brimmer*, 74 N. Y., 539.

The mere fact that the surrogate's decree setting apart the securities for the benefit of the plaintiff as a *cestui que trust*, was made on his consent, does not preclude him from holding the trustee liable for negligent investment: *Roosevelt v. Roosevelt*, 6 Abb. N. C., 447.

In order to establish a ratification by the *cestui que trust*, the ratification must not only be clearly proved, but it must be shown that it was made with a full knowledge of all the material facts, and also that the *cestui que trust* was fully apprised of their effect and of his or her legal rights in the premises: *Adair v. Brimmer*, 74 N. Y., 539.

If the trustee has not exercised due care and good faith, the court may decree that he keep the property and make the fund good: *Roosevelt v. Roosevelt*, 6 Abb. N. C., 447.

Where executors have made an unauthorized sale or disposition of lands they are personally liable for the value

of the lands at the time they conveyed, with interest from that time : *Adair v. Brimmer*, 74 N. Y., 539.

Where there are several executors, each has entire control over the assets in his possession, and his acts in relation thereto bind the others ; and this rule applies to notes taken by the executors for the assets of the estate : *Rosborough v. McAliley*, 10 S. C., 235 ; *Rhame v. Lewis*, 18 Rich's (S.C.) Eq., 269.

Where an executor by his negligence suffers his co-executor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the beneficiaries for the waste : *Adair v. Brimmer*, 74 N. Y., 541.

Where securities were intrusted to one of the executors for sale, on his promise to pay the proceeds into the general fund, which promise he failed to perform ; held, that permitting him so to act was not such negligence on the part of the other executors as would render them liable for such default : *Adair v. Brimmer*, 74 N. Y., 541.

Executors are not entitled to be credited in their accounts with interest paid to raise money for advances to beneficiaries in excess of their distributive shares : *Adair v. Brimmer*, 74 N. Y., 540.

Where excessive payments are made, or moneys drawn, by one executor, with the consent or acquiescence of the others, out of a fund which has been collected, and has come into the possession of such other executors, or the joint possession and control of all, they all become liable not only to make good to the other distributees, on the final distribution, any excess of advances so made, but at all intermediate stages to make good all payments which become due or payable, under the provisions of the will, to such distributees : *Adair v. Brimmer*, 74 N. Y., 540.

As to whether where an agent appointed by all the executors jointly, to manage the financial affairs of the estate, makes over payments out of the funds held by him as such agent, all the executors are jointly liable, *quære* : *Adair v. Brimmer*, 74 N. Y., 541.

Where excessive payments have been made by one of several executors, without the authority or consent of the others, out of moneys which have come

to his hands severally, and which have never come under the control of the other executors, that one will be held solely responsible for so much of the fund as has thus come to his hands, and be credited only with such amounts as have been legally paid, or which, if himself a legatee, he was legally entitled to retain. But the excess in his hands cannot be subtracted from the general account of all of the executors as a payment to a legatee ; it must remain in the account as so much assets of the estate, and when the whole balance of the estate not legally disposed of is thus ascertained, the question in what proportion the several executors are liable for such balance must be determined : *Adair v. Brimmer*, 74 N. Y., 540.

Where an accounting by executors does not purport to be final, or to dispose of the whole estate, it is not essential that interest should be computed down to the surrogate's decree ; when all the accounts presented are made up to a certain date it is sufficient ; the state of the accounts on that date when established, will furnish the starting point for a further or final account.

The accounts credited, and the surrogate's decree allowed to the executors, all payments made to the beneficiaries, without regard to their distributive shares ; held, error : that the accounts should have been made up so as to show the net amount of assets in the hands of all the executors, collectively, and the distributive share to which each distributee was entitled at the time of the accounting, and that the executors were only entitled to credit for payments to distributees to the extent of the distributive shares to which each was entitled ; they could not claim credits for over payments, and thereby diminish or postpone the amounts payable to other legatees : *Adair v. Brimmer*, 74 N. Y., 540.

Two of the executors who were indebted to the estate, with the consent of their co-executors, gave their individual bond in satisfaction of a mortgage payable to the estate ; the transaction was advantageous to the estate, and the bond was so given to obviate an objection that the executors, as such, had no power to give it. Held, that the fair inference was that the bond was given on behalf of the estate, and

the executors were entitled to be credited with payments made on the bond : *Adair v. Brimmer*, 74 N. Y., 540.

A debt owing by one of several executors to the testator, at the time of his decease, is an asset in the hands of the debtor executor, for which he is solely responsible, but it should appear as such asset in a joint account rendered by the executors; it cannot be credited as an uncollected asset : *Adair v. Brimmer*, 74 N. Y., 540.

It has been held that the appointment of a debtor as administrator converts the debt into assets in his hands to be accounted for, and that his sureties, as such, are liable therefor though he were insolvent : *Bigelow v. Bigelow*, 4 Ohio, 138; *Hull v. Pratt*, 5 Ohio, 72; *Collard v. Donaldson*, 17 Ohio, 264; *Tracy v. Card*, 2 Ohio, 432; *Lelands v. Felton*, 1 Allen, 535; *Mattoon v. Cowling*, 13 Gray, 387; *Twitty v. Howser*, 7 S. C., 153; *Jacobs v. Woodside*, 6 S. C., 490, 498.

See 11 American Decisions, 567, note by Mr. Proffat; *Guard v. Towle*, 54 N. H., 290; *Wheeler v. Emerson*, 44 N. H., 182; *Smith v. Jewett*, 40 N. H., 513; *Charles v. Jacobs*, 9 S. C., N.S., 295.

Otherwise in *Missouri* by statute: *McCarty v. Frazer*, 62 Mo., 263, distinguishing *Eaton v. Walsh*, 42 Mo., 272.

But the rule does not apply to one who is conditionally liable to the estate as surety on the bond of a previous executor : *Shields v. Odell*, 27 Ohio, 398.

Where an executor has not cancelled a judgment against himself in favor of the testator, a subsequent administrator, with the will annexed, may enforce the judgment : *Charles v. Jacobs*, 9 S. C., N.S., 295.

As against one who receives the property of an intestate under an agreement to take out letters of administration, and as against his sureties upon the granting of such letters, it is to be presumed that the property remained in his hands until his appointment was perfected. To repel such presumption, evidence is inadmissible that the administrator was insolvent and harassed with debts at the time of his appointment, and that immediately before it he had converted other trust funds to his own use : *People v. Hascall*, 22 N. Y., 188.

See 4 Eng. Rep., 493 note; 14 Eng. Rep., 419 note.

Where the same person is executor and also guardian, with different sureties for each capacity, if he have moneys in his possession as executor in order to shift the responsibility from one class of sureties to the other, some distinct act or declaration is necessary on the part of the executor indicative of his intention to hold the fund in his character of guardian : *Smith v. Gregory*, 26 Grattan (Va.), 257 and cases cited; *Perry v. Campbell*, 10 West Va., 228; *State v. Brown*, 68 N. C., 554.

See also *Bissell v. Saxton*, 66 N. Y., 55; on second appeal, 19 Alb. L. J., 260; *Scofield v. Churchill*, 72 N. Y., 565; *Merley v. Metamora*, 78 Ill., 394; *Bacon v. Shier*, 16 Grant's (U.C.) Chy., 485; *Ewart v. Gordon*, 13 Grant's Chy., 40.

Though many cases hold that where the same hand is to pay which receives it is an actual payment, and that going through the mere form of a transfer is useless and unnecessary : — *v. Du Rham*, *Macnaghten's Select Cases*, 218, marg. p.; *Weir v. People*, 78 Ill., 192, 2 Month. Western Jur., 551; *Jacobs v. Woodside*, 6 S. C., N.S., 490.

See also *Pratt v. Foot*, 9 N. Y., 463; *Beach v. Smith*, 30 N. Y., 181; *Pattison v. Guardians, etc.*, 1 Hurl. & Norm., 523; *Com. Bank v. Union Bank*, 11 N. Y., 203.

Though crediting himself as executor and charging himself as guardian would be sufficient if he had the property, though it turned out worthless : *Crawford v. Brewster*, 57 Geo., 226; *State v. Hull*, 53 Miss., 627; *State v. Brown*, 68 N. C., 554; *Pattison v. Guardians, etc.*, 1 Hurl. & Norm., 523. But see *Knight v. Blanton*, 51 Ala., 333.

Where an executor, without actually having the money in his hands, closed on his books his account as executor, opened one as guardian for the same amount, and transferred the balance due from him as executor to his debit as guardian, held he could not do so, so as to exonerate his sureties as executor from liability to the legatee therefor. Where neither the legatee nor the sureties are parties to a suit by the executor, they are not bound by the deter-

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mination therein: *Smith v. Gregory*, S. C. second appeal, 19 Alb. L. J., 260; 26 Gratt. (Va.), 248; *Knight v. Blanton*, 51 Ala., 333. *Scofield v. Churchill*, 72 N. Y., 565; *Merley v. Metamora*, 78 Ills., 394.

See *Bissell v. Saxton*, 66 N. Y., 55;

[6 Chancery Division, 566.]

V.C.M., June 12, 1877.

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*MEEK V. DEVENISH.

[1875 M. 29.]

Devise of Real Estate—Direction to Sell—Contingency—Conversion—Election to take in Specie.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death.

GEORGE MEEK made his will, dated the 29th of May, 1851, and thereby, after giving various legacies, gave, devised, bequeathed and appointed all the rest, residue, and remainder of his real and personal estate and effects to which he might be entitled, or which he might have power to appoint at the time of his decease, to his wife and his son George Meek the younger, and Charles Henry Weston, their heirs, executors, administrators and assigns, according to the natures and quality thereof respectively, upon trust to sell and dispose of the same, with power nevertheless for his trustees for the time being in their discretion, and for such time as might seem expedient, to defer the sale and conversion of all and any part of his residuary real and personal estate, and so long as his real estate, or any part thereof, should remain unsold, to keep the same in tenantable repair. And the testator declared that his trustees for the time being should stand possessed of the money arising from his said residuary, real and personal estate upon trust, in the first place, to pay thereout all his funeral and testamentary expenses and debts, and upon further trust to invest the residue of the said money in manner therein mentioned, and to hold the same and the income thereof upon trust during the widowhood of his wife, out of the income to pay to his wife or her assigns, for her and their own benefit, the yearly sum of £750, and subject as aforesaid upon trust to pay the residue of the income which should accrue during the widowhood of his wife unto his son George Meek the younger, unless and until he should do any act whereby or in consequence whereof all or any part of the income, if made payable [567] able to him absolutely *would become vested in, or disposable by, any other person or persons, or unless and

until any legal or equitable proceedings should be taken or enforced against him or his property by reason whereof all or any part of the same income, if payable to him absolutely, might be applied for the purpose of satisfying any debt or debts then due, or thereafter to become due, from him; and in case the estate thereinbefore limited to his son George Meek the younger should determine during the widowhood of his said wife, then upon trust to pay the residue of the income thenceforth to accrue during such widowhood unto his said wife, and after her death or second marriage, which should first happen, upon trust as to one equal moiety of the trust premises, and the income thenceforth to accrue in respect thereof for his son George Meek the younger, his executors, administrators and assigns absolutely, and as to the other equal moiety of the said trust premises, and the income thenceforth to accrue in respect thereof, in case the estate thereinbefore limited to his son George Meek the younger should not have determined during the widowhood of his wife under the proviso thereinbefore in that behalf contained, and his son should not have done any act whereby the second moiety should be vested in any other persons, then upon trust for the absolute benefit of his son George Meek the younger, his heirs, executors and administrators. And after declaring that his son George Meek should not be deprived of the benefit of any of the trust thereinbefore contained in his favor by reason of his executing any deed or deeds of settlement in contemplation of any marriage he might contract, the said George Meek the elder declared that in case of any event whereby the trust lastly above stated should become inoperative, that the said second moiety and the income thereof should be held by the trustees or trustee for the time being of his will, from and after the decease or second marriage of his said wife, upon certain trusts in favor of George Meek the younger and his wife and children, which in the events that had happened had failed, and were incapable of coming into operation.

By a settlement dated in September, 1858, made upon the marriage of George Meek the younger, to which George Meek the elder was a party, George Meek the elder covenanted that his executors *or administrators should [568 within six months after the death of himself and Amelia Meek, his wife, pay to the trustees of the settlement the sum of £20,000, and that he the said George Meek the elder, his executors or administrators, would in the meantime, and until the £20,000 should be paid, pay to the trustees an annual sum of £1,000, as and for interest on such sum of

£20,000. Provided always, that in case he or his wife should pay the said sum of £20,000 during their lives then the annual payment of £1,000 should cease, and it was declared that the £20,000 should be held by the trustees upon the trusts of the settlement.

George Meek the elder died on the 8th of December, 1859, and his will was proved by his son, who took possession of his real and personal estate, and thereout paid his debts and funeral expenses, except the £20,000 covenanted to be paid to the trustees of the settlement.

After the death of George Meek the elder, the freehold estates remained unsold, and Amelia Meek resided with George Meek the younger at Brantridge Park, which was part of the real estate, during his life. George Meek the younger was never declared bankrupt and never did or suffered anything whereby any of the interest to which he was entitled under the said will or settlement determined.

George Meek the younger, during his life, retained the annual sum of £1,000 covenanted to be paid to the trustees of his settlement, and no part of the £20,000 had yet been paid.

George Meek the younger made his will on the 7th of December, 1874, and thereby after giving various directions as to his furniture, books, and other chattels, declared that it should be lawful for his wife during her widowhood to occupy his dwelling house at Brantridge Park and the lands appertaining thereto, and subject thereto, he gave, devised, and appointed all his freehold and copyhold messuages, lands, tenements, and hereditaments in Sussex, being the estates devised by his father's will, to certain uses in favor of his sons and their issue (which in the events that had happened had failed), and in case of the failure of such estates, to the use of his daughter the plaintiff, Constance Amelia Meek, for life, and after her death to the use of the first and every other son of his daughter in tail, with remainder to 569] her first and other *daughters in tail, with remainder to his daughter the defendant, Mary Florence Meek, for life, and afterwards to her sons and daughters in tail, with remainder to certain uses in favor of his other daughters and their issue, and in case of the failure of such estates the testator directed that his said freehold Sussex estates should sink into and form part of his residuary estate. And the testator bequeathed all his personal estate to his trustees to sell and convert into money, and stand possessed thereof in trust for all his children upon attaining twenty-one in manner therein mentioned.

George Meek the younger died on the 8th of December, 1874, and his legal personal representatives became also the legal personal representatives of George Meek the elder. George Meek the younger left his wife Fanny Amelia Meek, and Amelia Meek, his mother, and the plaintiff and the defendant, Mary Florence Meek, who were infants, his only children him surviving. Fanny Amelia Meek died on the 13th of December, 1874, and Amelia Meek died on the 15th of December, 1874. George Meek the younger was at his death possessed of real and personal estate of considerable value in addition to the Sussex estate specifically devised by his will.

The bill was filed for the administration of the real and personal estate of George Meek the younger, and for the administration of the real and personal estate of George Meek the elder, and for carrying out the trusts of both wills under the direction of the court.

Glasse, Q.C., and Levett, for the plaintiff: The question now raised is, whether under the will of George Meek the younger, the property which he took under his father's will passes as real or as personal estate. The son, by his will, has dealt with it as real estate, and during his life he dealt with it as such. If the property is still to be considered realty, it will go to the plaintiff his eldest daughter as his devisee; but if it is personal estate, then it will belong to the residuary legatees, that is to say, it will be divided between both the daughters of the testator instead of going in the first instance to one only. There was a clear election by the son to keep the property as freehold. He lived with his mother in the family mansion and never sold any *portion of the estate. But he retained out of the [570 income the £1,000 which was covenanted to be paid to him by the settlement.

This case comes within the law as laid down in *Mutlow v. Bigg* ('), we are therefore justified in assuming that with the consent of the legatees and all the rest of the family, there was an election to keep the property as freehold estate.

Bristowe, Q.C., and Giffard, for the second daughter of George Meek the younger: By the will of George Meek the elder there is an absolute direction to convert the real estate, and it was the duty of the son, who was the sole acting trustee, to have sold the estate. He never discharged himself of the duty of a trustee. He could not do otherwise than receive the rents, since he had to pay his mother £750 a year, and to retain for himself the money covenanted to be

(') 1 Ch. D. 385; 15 Eng. R., 803.

paid to him under his marriage settlement. It was not unlikely that he wished to retain the estate in specie during his mother's life, in order that she might continue to reside in the house, but there is no act of his which can be construed as an election to keep the property unsold after her death. If the son had done anything to vest the property for the benefit of other persons during the life of his mother he would not have been entitled to the real estate, therefore the estate was not his absolutely. He was only entitled in certain events which might happen during his mother's life. The trust had not been wound up, and if he had died intestate the whole produce of the estate must have gone to his legal personal representatives. *Sisson v. Giles* (1) is in favor of our contention.

J. Pearson, Q.C., and Northmore Lawrence, for the trustees and executors of the will.

Higgins, Q.C., and E. Ford, for the trustees of the marriage settlement.

MALINS, V.C., after stating the effect of the will to be to give George Meek the younger, after his mother's death, one moiety of the estate absolutely, and to give him the 571] other moiety in the *event (which happened) of his not doing any act during the widowhood to divest the income, or any act to divest the second moiety, continued :

Now comes the question whether he was entitled to the whole produce of this estate? In my opinion there can be nothing more clear than that a person who is absolutely entitled to the produce of real estate has a right to say, "I will not have it sold, I desire to keep it in specie," and if the trustees resist that demand he can, as a matter of course, get an injunction to prevent their selling, provided the necessary provision is made for charges, and it is equally clear that if the person giving that notice is not absolutely entitled, but that other persons are interested with him, that is, if the property is divided between two persons and one of them gives notice that he will retain it in specie, that is an absolute nullity against his companion, because he cannot do anything to prejudice another person, and the trustees would be bound to sell. If a man gives his property to be sold, and divides the proceeds into one hundred shares, and gives ninety-nine of those shares to A. and one share to B., A. cannot, without B.'s concurrence, retain the property in specie, and B. would have a right to say, "I will have it sold;" and, therefore, unless you get the concurrence of all parties no election can take place.

(1) 3 D. J. & S., 614.

The other point which I have to decide here (and it is one upon which I have had not the slightest doubt from the moment the case was opened) is, whether a person who is entitled absolutely in a contingent event may not, before the happening of the contingent event, bind the trustees and say to them, "If the contingent event happens before my death I will elect to have this property kept in specie." I have no doubt whatever that if the property is given to trustees upon trust to sell and pay the produce to A. if one event happens, and to B. if another event happens, and B. says, "If I become entitled to this property I will not have it sold," and that event happens in his favor, he has an equal right to say to the trustees, "I will not have the property sold." It is not necessary that he should be absolutely entitled to the whole property when he gives the notice, but when he becomes entitled the previous notice is operative. In this case the testator, George Meek the younger, was absolutely entitled unless *an event should happen [572 which never did happen, and therefore if he had given formal notice to the trustees they would have been bound to obey that notice when it was ascertained, as it was on his death, that in the event that happened he became absolutely entitled to the property.

Now is there anything to be found in the books contrary to that? I should be astonished if there were. The only case relied upon is the case of *Sisson v. Giles* (¹), which is a decision of Lord Westbury's. The decision is this—two persons were absolutely entitled to the produce of real estate; they were required to execute a deed-poll requiring the estate not to be sold. Nothing could be more clear than that that they would stop the sale, but it turned out that one of them was a married woman, and the deed, therefore, went for nothing. That case is no authority in favor of the arguments I have heard from Mr. Bristowe and Mr. Giffard.

Then is there any principle on which a man who is entitled to an estate in a contingent event, which may happen in his favor, may not give notice that if that event does happen he will have the land itself instead of the money? A man may have a favorite estate, as I have pointed out, given to him in a contingent event, and would not have it converted into money at any price whatever. Suppose a boy to be entitled to the estate, and if he dies under the age of twenty-one some one else becomes entitled, and he says to

(¹) 3 D. J. & S., 614.

the trustees, "Mind, if I become entitled to the estate I will keep it in specie," it would be a monstrous thing to say that, notwithstanding he gave that notice, he has no right to retain the estate in specie. That would be contrary to all principle. I believe the law to be thoroughly settled that, when a man is entitled to property in a contingent event, he may devise it, he may dispose of it, he may make it the subject of mortgage, or sell it, or make it the subject of election, or anything else. All he must do is to take care that nothing is done to interfere with the interest of third parties; and if notice is given while his interest is contingent, it is just as binding when the contingency happens as if it was given afterwards. If there were anything wanting to confirm me in this opinion, it would be the view taken 573] by the *Court of Appeal in the case which Mr. Glasse cited to me of *Mutlow v. Bigg* (').

My view on this point being perfectly clear and without a shadow of doubt, the only question that remains is, was there enough done by the testator to make an election? He survived his father for fifteen years. He and his mother and wife and family always lived in this place, and every act that he did showed his intention to keep it in specie. That I admit would not be enough. If he had simply died intestate, notwithstanding these circumstances, I think it would have gone as part of his personal estate. But he makes his will, and by limitations of the most cautious nature, deals with this property, giving his land, giving the mansion house, giving the whole estate in specie, and limiting it to the elder daughter for life, with remainder to her first and other sons successively in tail, and failing her issue, with remainder over. Therefore he has shown the clearest intention that this property shall not be converted, and that being the family residence, it shall be retained as such, and be the residence of the head of the family. I am as clear upon this point as I was upon the other, that he not only had the right to elect, but that he has done enough to make the election, and that this property must be treated therefore as part of his real estate; the consequence of which is that the infant plaintiff is entitled to the estate for life, with contingent remainders to her issue and remainders over to her sister Mary Florence Meek, and in the same manner remainders to her issue.

The declaration will therefore be that George Meek the younger had power to elect to take as real estate the estate

(') 1 Ch. D., 385; 15 Eng. Rep., 803.

devised by the will of George Meek the elder, and that he did elect by his acts in his lifetime to do so, and that the estate is to be treated as his real estate.

Solicitors for plaintiff: *Milne, Riddle & Mellor.*

Solicitor for defendant: *Rickards.*

[6 Chancery Division, 574.]

V.C.M., June 14, 1877.

***MASSAM V. J. W. THORLEY'S CATTLE FOOD [574
COMPANY.**

[1877 M. 104.]

Secret Process of Manufacture—Knowledge of Process—Right to Use of Name.

Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person afterwards manufacturing is entitled to describe it by the name of such original manufacturer, and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name.

THIS was a motion by the executors of Joseph Thorley, who had carried on the manufacture and sale of a compound known as "Thorley's Food for Cattle," seeking for an injunction to restrain the defendant company from carrying on business under certain prospectuses so contrived as to represent the business carried on by the defendant company as being the business of the plaintiffs, or the goods manufactured or sold or supplied by the defendant company as being goods manufactured, sold or supplied by or for the plaintiffs, and also restraining the defendant company from using the plaintiffs' trade-mark.

In the year 1855 Joseph Thorley commenced manufacturing, under the name of "Food for Cattle," a compound the nature of which was not disclosed, but of which, though he did not claim to be the discoverer, it appeared that during his lifetime he was the sole manufacturer. Subsequently to 1858 the business was carried on entirely in London. It had been previously carried on also at Hull.

From the time of his commencing business till his death, which happened on the 22d of November, 1876, he extensively advertised and sold the compound under the name of "Thorley's Food for Cattle," and he made the name of Joseph Thorley conspicuous as a distinguishing mark in connection with the sale of the compound.

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Massam v. J. W. Thorley's Cattle Food Company.

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575] *The packets in which the article was made up were covered with brown wrappers, on which the words "Thorley's Food for Cattle" were placed conspicuously at the top of a drawing of a farmyard, and a facsimile of Joseph Thorley's signature was written in the right-hand corner.

It appeared that the process of manufacture, though a secret one, was not invented by Joseph Thorley, but was communicated to him by a Mr. Fawcett, who had introduced it, and that Josiah Watson Thorley, a brother of Joseph, who had for a long period acted as manager of Joseph Thorley's business, was also acquainted with the process. The plaintiffs had registered under the Trade Marks Registration Act the facsimile of Joseph Thorley's signature as alone being the trade-mark of the business.

On the 13th of March, 1877, the defendant company was registered under the Companies Act, 1862 and 1867, with a capital of £200, divided into 4,000 shares of 1s. each, J. W. Thorley signing the memorandum of association for one share. The articles of association provided that the directors were to enter into an arrangement with Josiah Watson Thorley for the purchase of the secret process of manufacture and for his employment in the business of the company.

Shortly after commencing business the company issued and advertised a prospectus, headed with a facsimile of the seal of the company, which they had registered as their trade-mark, and the words "J. W. Thorley's Cattle Food Company, Limited." It contained the following passages:—

"The company has been formed for the purpose of supplying agriculturalists, breeders of cattle, and the public in general, with this celebrated cattle food at a considerable reduction from the prices hitherto charged for this far-famed condiment.

"In making this announcement the company beg to say that, having made arrangements with Mr. J. W. Thorley, brother of the late Joseph Thorley, of Thornhill Bridge, King's Cross, and for twenty-five years his manager, all the food manufactured will be under his personal supervision and control, and all the ingredients used in its composition and preparation will be the very best that can be obtained, regardless of cost. Therefore the public may have every confidence that the article manufactured and 576] sold by *the company will be genuine and equally beneficial, *it being manufactured in accordance with the original recipe.*"

The prospectus also contained directions for the use of the compound, which were identical with those formerly issued by Joseph Thorley.

The packets in which the article was wrapped also contained a facsimile of the seal of the company, and the words "Thorley's Food for Cattle," and also directions for use identical with those in the advertisements.

Some correspondence had taken place between the solicitors of the parties, in which the defendants claimed the right to use the designation "Thorley's Food for Cattle," on the ground that they were really making the genuine article.

Glasse, Q.C., and *Nalder*, for the plaintiffs: The advertisements amount to a representation that the defendant company are entitled to carry on the business formerly carried on by Joseph Thorley. The mere insertion of the initials "J. W." is not sufficient to distinguish the one from the other; and though the name of the company is "Thorley's Cattle Food Company," the article itself is described on the packets as Thorley's Food for Cattle. Even if J. W. Thorley were entitled to use the name, he could not give the company a right to use it. The company, however, is a mere sham, having no substantial capital and no means of carrying on a real business.

Higgins, Q.C., and *Townsend*, for the defendant company: This case is completely covered by *James v. James* ⁽¹⁾. The article in question has become well known in the trade, and is recognized as a commercial article in common use. Moreover, the company are entitled to say that they make Thorley's Food for Cattle. It is not disputed that J. W. Thorley knows how to make the article in question, and he has a perfect right to hold out to the world that he does make it. The company may do anything short of representing that the article is manufactured by Joseph Thorley: *Croft v. Day* ⁽²⁾. With regard to the company, the Companies Act does not limit the amount of the shares, and *there is nothing to prevent a company starting [577 with any amount of capital, however small.

Glasse, in reply: This is a very different case from *James v. James* ⁽³⁾. This is obviously the case of some persons on the look-out for the means of availing themselves of the reputation of Thorley's Food for Cattle, and by obtaining the concurrence of J. W. Thorley in getting up a fictitious company to palm themselves off upon the public as repre-

⁽¹⁾ L. R., 13 Eq., 421; 2 Eng. R., 365.

⁽²⁾ Law Rep., 13 Eq., 421; 2 Eng. R.,

⁽³⁾ 7 Beav., 84.

365.

senting the original business. J. W. Thorley is not the real trader, and there is that false representation in putting forward his name in connection with the company which the Lord Justice Turner referred to in his judgment in *Burgess v. Burgess* ⁽¹⁾ as entitling a party complaining of it to relief.

MALINS, V.C.: If this were a mere case of a trade-mark, it is perfectly clear that whatever trade-mark Joseph Thorley acquired, and had an exclusive right to, would now belong to the plaintiffs as his executors. This right has been clearly established by such cases as *Wotherspoon v. Currie* ⁽²⁾, *Dence v. Mason*, which came before me on the 25th of January, 1877, *Croft v. Day* ⁽³⁾, and many other cases. But this is the case of the production of a certain article which was made by Joseph Thorley, and is now made, or can be made, by Josiah Watson Thorley, who has just the same knowledge upon the subject as was possessed by his late brother. Now, under these circumstances, he proposes to set up in business. I will take the case first as if he were doing so in his own individual capacity. Would he then be entitled to carry on business and sell the article as "Josiah Watson Thorley's Cattle Food," or using his initials only, as "J. W. Thorley's Cattle Food?" The article is not a patented article, and it was known to each of the two brothers equally. Their name was "Thorley," and I can see no principle upon which, as Joseph was entitled to carry on business and call what he sells "Thorley's Cattle Food," Josiah is not entitled to do the same. His name is "Thor-578] ley," and he sells the same cattle *food, and I think that, even during the lifetime of his brother, if he and his brother had differed and separated, they would both have been entitled to sell the article as "Thorley's Food for Cattle." But that did not happen, and Joseph seems to have had the exclusive use of the name during his lifetime.

Now, Mr. Higgins referred me to the case of *James v. James* ⁽⁴⁾, which was decided by Lord Romilly in 1872 as being conclusive upon this subject. And certainly it does decide a very important principle, and one which I think I am bound to follow in the present case. [His Lordship then read the head-note, and continued:] Now, there the facts were that a lieutenant in the army named Robert James in 1833 discovered an ointment which became widely known as "Lieutenant James's Horse Blister." The defendant was the grandson of that Lieutenant James, and he

⁽¹⁾ 3 D. M. & G., 896.

⁽³⁾ 7 Beav., 84.

⁽²⁾ Law Rep., 5 H. L., 508; 3 Eng. R., 29.

⁽⁴⁾ Law Rep., 13 Eq., 421; 2 Eng. R., 365.

set up in business and made this horse blister, the secret of which he had become acquainted with, and he also called it "James's Horse Blister." Now, although he might make a horse blister, and even make the same blister as that discovered by his grandfather, Robert James, yet he was not entitled to call it "James's Horse Blister." The Master of the Rolls, Lord Romilly, says this⁽¹⁾: "There are two points upon which I wish to hear the defendants. I think they must not use the name of Robert James simply, but must put 'Robert Joseph James'—that being the real name of the defendant—"I also think they must not in any advertisement, or in any circular, use any expression which asserts or suggests that the thing manufactured by the plaintiffs is either spurious or not genuine. I will state my reasons for that: First, I am of opinion that when a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like) may sell those ingredients, and may use the name of the person who has discovered them, after his death but not in his lifetime, so as to suggest they are made by him."

Some observation was made by Mr. Glasse, which is probably well founded, that there may not be such a distinction between what was done in the lifetime of the discoverer and after his death. I confess I think there is no difference, but if there be a *difference this is all in his favor, because [579 this has occurred after the death of Mr. Thorley. The Master of the Rolls further says: "In this case Lieutenant James discovered a process for making a very valuable blister for horses. As soon as he died that became a matter of trade, and any person might make Lieutenant James's blister for horses after that time, provided he had got the prescription for that purpose properly and fairly. Any one who, in the course of the business, has ascertained how it is made, and chooses to state to the public that he has heard how Lieutenant James's blister for horses is made, in my opinion is entitled to publish himself as making Lieutenant James's blister for horses, provided he does not say anything to show that it was made by the person to whom Lieutenant James has left his property. If there had been a question of fraud, or the defendants were acting contrary to an agreement by which they were not entitled to do what they have done, then the court would interfere; but that is not the question here, for what the plaintiffs in this case really complain of is, not of the defendants making the preparation,

(¹) Law Rep., 13 Eq., 424; 2 Eng. R., 368.

but of their calling it Lieutenant James's Blister. I am of opinion they are entitled to call it Lieutenant James's Blister, because it has acquired that title in the commercial world in the same manner as the 'Reading Sauce' or 'Harvey's Sauce.' Now, therefore, the rule is laid down that this thing, "Lieutenant James's Blister," having acquired a reputation, being known by that name, any person using the same ingredients and producing the same result, was not only entitled to do the thing, but call it by the name of the original inventor, in order to identify it with the very same thing which Lieutenant James had invented. In the present case the evidence is conclusive that the thing produced by the defendant Josiah Watson Thorley is the same as was produced and sold by his late brother Joseph. He is in possession of the same secret, obtained from the same source. He must undoubtedly not sell under the name of "Joseph," and he must not sell it in such a manner or with such a label, characteristic device, or advertisement as should lead the public to believe that the mixture was made by the late Joseph Thorley, or by his representatives, or by any other person than the defendant himself.

The defendant, I take it, is a man not possessed of any 580] capital, *not having set up business in his own individual capacity in the name of "Josiah Watson Thorley," as I am clearly of opinion he would have been entitled to do, and he has sufficiently shown that he did not attempt to commit any fraud upon the representatives of his brother by using his own name, "Josiah Watson" or "J. W. Thorley," which distinguishes it from "Joseph." However, being, as I collect, a man of no capital, he forms a company, or becomes a party to the formation of a company, and, certainly, as far as the formation of the company is concerned, I do not entertain a very favorable opinion of it, because it is, of all companies that I ever saw, the most ridiculous, and I should not have supposed that such a thing could have been. It is a company having a capital of £200 divided into 4,000 shares of 1s. each, and, accordingly, the memorandum of association is signed by seven persons for one share each. It appears that there is no limit by the Companies Act, 1862. If seven shillings will do, seven pence or seven farthings will do. Mr. Higgins says that what the Legislature has done must be taken to be right. If the Legislature has not thought fit to fix a limit below which the nominal amount of the shares shall not be, I suppose in law it is as legal to form a company with a certain

number of shilling shares, as shares of one pound each, as is often done, or of any other amount.

[His Lordship then referred to the constitution of the company, and concluded that there was nothing in it to lead to the inference that it was not formed *bona fide* for the purpose of manufacturing the genuine compound as made by Josiah Watson Thorley, and continued:]

If therefore I am right in saying that he would have been at liberty to set up this business in his own name, and to call this "Josiah Thorley's Cattle Food," he might have had one partner, he might have had five partners, he might have had any number, as a private partnership less than seven, and in law by the Companies Act it is provided that a man may associate with himself as many partners as he likes, 100, 1,000, or 100,000 if he chooses, provided it is a company registered under the act. That which he could do with regard to a private partnership he is at liberty to do with regard to a public company, and if it suited him and those associated with him, instead of working it as a private *partnership to make it a public company. I am at [581 a loss to see any ground upon which he is not entitled to say, "I carry on business not only in my own name, but in the name of a limited company. I am at the head of it, my name is valuable, the article we are going to make is the article known under the name of 'Thorley's Cattle Food,' and this is a company for the manufacture of that food."

That being the case, is he doing anything which is calculated to deceive? [His Lordship then read and commented on the terms of the advertisement, and continued:] Mr. Glasse says that the directions to use the food are precisely the same in both. If the article produced is the same, and he is quite at liberty to produce the same article, then these are the correct directions for the use of it, and he can only repeat them, and therefore the directions for the use of it are not improper.

Then is the trade-mark any encroachment upon any of the rights of the plaintiffs? The trade-mark of the plaintiffs is distinctly stated to be "Joseph Thorley." That is the facsimile of his name in his own handwriting. That is his trade-mark, and his only trade-mark. The label which he issues is the farmyard with the cattle about it, which, I suppose, eat this food. Well, the label here is the label of the defendant, and he calls it, no doubt, "Thorley's Food for Cattle." It is Thorley's Food for Cattle. The plaintiffs' trade-mark is simply "Joseph Thorley," with a facsimile of the signature in his own handwriting. The trade-mark of

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the defendant is a label containing the heads of many of the animals who eat this food, if not all. It is as distinct as possible. On the whole, I come to the conclusion, according to what the Master of the Rolls decided in *James v. James* (¹), that this "Thorley's Food for Cattle" has become an actual commercial name, and anybody who can produce the same article as this defendant company does is undoubtedly entitled to the use of the name "Thorley," provided he does not use it in such a manner as to lead the public to believe that while they are buying the defendants' condiment they are really buying the plaintiffs'. I have been unable to discover anything which would lead the public to believe they were buying one for the other. One 582] is "Joseph Thorley's *Food for Cattle," and this will be advertised as "Josiah Watson Thorley," or "J. W. Thorley's Cattle Food." The two things are so perfectly distinct, that I do not think there is any danger of fraud arising out of it.

Upon the whole, therefore, I think the motion must be refused.

Solicitors: *Collyer-Bristow, Withers & Russell; W. Eley.*

(¹) Law Rep., 18 Eq., 421; 2 Eng. R., 365.

To same effect, see <i>Meneeley v. Meneeley</i> , 62 N. Y., 427; <i>Gilman v. Hunnewell</i> , 123 Mass., 139; <i>Helmhold v.</i>	<i>Helmhold, etc.</i> , 17 Am. L. Reg., N.S., 169, 53 How. Pr., 58; <i>Decker v. Decker</i> , 52 How. Pr., 218.
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[6 Chancery Division, 582.]

V.C.M., June 30, 1877.

THORLEY'S CATTLE FOOD COMPANY V. MASSAM.

[1877 A. 112.]

Injunction—Advertisement—False Statements—Injury to Trade—Judicature Act, 1873, s. 25, subs. 8.

Upon motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the plaintiffs' trade,

The court was of opinion that notwithstanding the decision in *Prudential Assurance Company v. Knott* (¹), it now had power by the Judicature Act, s. 25, subs. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application.

THIS was a motion on behalf of the plaintiffs, Thorley's Cattle Food Company, for an injunction to restrain the defendants from advertising or representing in their advertisements or circulars that they were alone possessed of the secret for compounding the condiment known as "Thorley's Food for Cattle," and from representing that the cattle food manufactured and sold by the plaintiffs was spurious or not

(¹) Law Rep., 10 Ch. 142; 11 Eng. R., 498.

genuine, or not compounded in accordance with the true recipe of the same ingredients, and in the same proportions and in the same manner, as the condiment known as "Thorley's Food for Cattle," manufactured and sold by Joseph Thorley in his lifetime.

The following was the advertisement complained of:--

"Caution. Thorley's Food for Cattle.

"The public, and in particular farmers, graziers, dealers, and others purchasing this world-famed food, are warned that any food for cattle purporting to be Thorley's Food for Cattle, and not signed *with the name 'Joseph Thor- [583 ley,' is not the manufacture of this establishment carrying on business as Joseph Thorley, the proprietors of which are alone possessed of the secret for compounding that famous condiment, and carrying on business at Pembroke Wharf, Caledonian Road."

In a case of *Massam v. J. W. Thorley's Cattle Food Company* (¹), the plaintiffs, who are the defendants in this case, and who are the representatives of the late Joseph Thorley, applied for an injunction to restrain the defendants in that case and the plaintiffs in this from carrying on their business under the prospectuses and advertisements issued by them, or under any prospectuses or advertisements so framed as to represent the business carried on by them as being the business of the plaintiffs, or the goods manufactured and sold by them as being goods manufactured and sold by the then plaintiffs.

In that case it appeared upon the evidence that Josiah Thorley, who was the promoter of the Thorley's Cattle Food Company, was brother to Joseph Thorley, by whom the food for cattle was originally sold, but it appeared also that Josiah Thorley was formerly the manager of his brother's business, and was in the habit of mixing or manufacturing the cattle food, and that the secret for compounding the condiment was communicated to both Joseph Thorley and Josiah Thorley by a person named Fawcett, who was the inventor of it.

The Vice-Chancellor refused to grant an injunction, being of opinion that Josiah Thorley had an equal knowledge of the mode of compounding the cattle food with his brother, and had an equal right to use the name of Thorley's Cattle Food. After the decision of the Vice-Chancellor, the plaintiffs in that case gave notice to Thorley's Cattle Food Company that they discontinued the action.

(¹) *Ante*, p. 574.

Higgins, Q.C., and Townsend, for the plaintiffs: It was admitted in the case in which we were defendants that Mr. Josiah Thorley had possession of the secret as well as his brother Joseph Thorley, both of them having had it from Fawcett. If the advertisement had omitted the last paragraph, stating that the defendants are the sole possessors 584] of the secret, we should not *have objected. The ground of your Lordship's decision on the previous occasion was that Josiah Thorley knew as much about the method of compounding the cattle food as his brother. We contend that it is a slander upon our title, and that we have a right to an injunction to restrain the publication of a false advertisement which is calculated and intended to injure our trade. The cases we rely upon in support of our argument are *James v. James* (¹) and *Rollins v. Hinks* (²). The defendants are entitled to say that none is genuine as the production of Joseph Thorley which has not got his name upon it; but they have no right to slander our title and to injure our trade by such an advertisement as this, which falsely represents that we are not able to manufacture the genuine food for cattle as originally made and sold by Joseph Thorley.

Glasse, Q.C., and Nalder, for the defendant: In the first place the advertisement does not say that we are alone the possessors of the secret for making the cattle food, but that we are alone in possession of the secret for compounding that famous condiment, the manufacture of which is carried on at our establishment. But the plaintiffs have no right to the interference of this court by way of injunction, and we rest our case upon the *Prudential Assurance Company v. Knott* (³), where it was held that this court has no jurisdiction to restrain the publication of a libel, even if it is injurious to property. In that case your Lordship's decisions in *Dixon v. Holden* (⁴) and *Springhead Spinning Company v. Riley* (⁵) were disapproved of. Here there is not even an allegation that special damage has been sustained.

Higgins, in reply, upon the point of jurisdiction: The case of the *Prudential Assurance Company v. Knott* is very different from this. That was a case of libel, but this is slander of title and damage to trade. They are publishing a libel upon our commodity, and at the hearing there would be an inquiry as to damages. Our writ is for an injunction

(¹) Law Rep., 13 Eq., 421; 2 Eng. R., 365.

(²) Law Rep., 10 Ch., 142; 11 Eng. R., 498.

(³) Law Rep., 13 Eq., 355.

(⁴) Law Rep., 7 Eq., 488.

(⁵) Law Rep., 6 Eq., 551.

and for damages, and I am *entitled to have the advertisement stopped pending the trial. In the case of the *Western Counties Manure Company v. Lawes Chemical Manure Company* ⁽¹⁾, it was held to be actionable for the defendants falsely and without lawful occasion to publish a statement disparaging the quality of the plaintiffs' goods from which special damage resulted. That is precisely our case. [585]

But if the court should consider itself fettered by the case of the *Prudential Assurance Company v. Knott* ⁽²⁾, there is further power now given to the court by the Judicature Act, 1873, s. 25, subs. 8, to grant an injunction in all cases in which it shall appear to the court to be just or convenient that such order should be made.

MALINS, V.C.: The object of the motion which was before me in *Massam v. Thorley's Cattle Food Company* was to restrain the defendants, the company, from manufacturing and selling the condiment known as "Thorley's Cattle Food." After a very lengthened hearing of that motion I came to the conclusion that the plaintiffs had no exclusive right as representing the late Joseph Thorley, because it was proved to my complete satisfaction that a man named Fawcett was the inventor of this mixture, and had communicated it to the late Joseph Thorley and to his brother Josiah Thorley, the man who formed this company, and that the late Joseph Thorley and his brother Josiah Thorley possessed equal knowledge, derived from Mr. Fawcett, as to the ingredients or composition of the condiment. I therefore dismissed the motion with costs, on the ground that Joseph Thorley's representatives had no exclusive right whatever to the title of "Thorley's Cattle Food." I am told now that my decision was conclusive, because the plaintiffs in that action were so far satisfied with my judgment that a few days afterwards they dismissed their action with costs; which, of course, is a complete and abiding submission to the propriety of the order I then made. A few days afterwards the executors of Joseph Thorley, who had thus failed in proving their title to the exclusive use of the title "Thorley's Food for Cattle," did that which they *were [586] perfectly entitled to do, advertise their food. They were entitled to advertise it in any way they thought fit so long as they did not state anything that was untrue, or anything that was calculated to injure the interests of Josiah Thorley. They accordingly issued the advertisement which has been

(1) Law Rep., 9 Ex., 218.

(2) Law Rep., 10 Ch., 142; 11 Eng. R., 498.

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read, concluding with these words: "The proprietors of which are alone possessed of the secret for compounding that famous condiment, and carry on business at Pembroke Wharf, Caledonian Road." Now, I can only read that advertisement as amounting to a statement that these persons carrying on business at Pembroke Wharf, Caledonian Road, are the proprietors of Thorley's Cattle Food, and that they alone are in possession of the secret of its manufacture. That statement is a positive untruth, because I have judicially decided the other way. In my judicial decision the parties who issued this advertisement have completely bound themselves by acquiescence. I must read this advertisement, not with the eye of a lawyer, not looking to see whether I can make it out to mean, by a very refined construction, something different from what it means to the public at large, but to ascertain what the public, reading this advertisement, would consider it to mean, and in that sense I take it to mean that if you want the genuine Thorley's Food for Cattle there is only one place in the world where you can get it, and that is at Pembroke Wharf, Caledonian Road, because the proprietors of that manufactory alone are in possession of the secret of making it. That, I repeat, is a positive untruth; because Josiah is as much in possession of the secret as the defendants are, and knowing that, and taking part in the judicial proceedings which decided the facts against them, I think it was highly improper that they should issue an advertisement which they knew to be false.

The plaintiffs, who are a company formed by Josiah Thorley, and who carry on their business under the name of "J. W. Thorley's Cattle Food Company, Limited," complain of this advertisement, because they say it is calculated to injure them in their trade; and I am very clearly of opinion that it is calculated to injure them in their trade, because if a purchaser believes this statement, that when he goes to Josiah he does not get the real article, he is deterred from 587] buying from Josiah because the *defendants represent it as a spurious article. Is that fair trading? Is it becoming in any tradesman when he has an article to sell to insert a statement which he knows to be untrue? because these people know as well as I do that they are not exclusively in possession of the secret, that Josiah knows all about it as well as they do, and they therefore, by unfair means, attempt to get possession of the trade; not only retaining their own trade, but doing their best to prevent Josiah getting any trade. That is unfair dealing.

Now, under these circumstances, that this is a thing which ought to be stopped can, in my opinion, admit of no doubt whatever, and if I were not fettered by authorities I should, without the slightest hesitation, have granted an injunction to prevent the continuance of such a practice as this. If I am fettered by authority I can only say that I am very sorry for it. Mr. Glasse says that I am so because of the case of the *Prudential Assurance Company v. Knott* (¹), which was decided by Lord Cairns, Lord Justice James, and Lord Justice Mellish, who held that in this court you cannot maintain a suit to prevent the publication of a libel. I confess I do not read that judgment as going to that extent; if it does, I am very sorry for it. The case of *Dixon v. Holden*, which I decided in the year 1869, was referred to by Lord Chancellor Cairns, but he was very far from saying that he should not have decided the case in the same way as I did; he does not say that the case was wrongly decided, but that much might be said in favor of it. In that case Mr. Dixon was a merchant of great repute in Liverpool, and he happened to employ a solicitor of that town; that solicitor thought fit to quarrel with him about his bill of costs, or something of that kind, and he persisted in stating day after day, in newspapers and placards over the town, that Mr. Dixon had been a member of an insolvent firm which had failed, and that it was treated as a fraudulent firm; if that were true, Mr. Dixon's character and reputation as a merchant were gone. I thought, upon the general principle of this court, which interferes by injunction to prevent the destruction of property, as we do interfere in very trivial matters where it goes to the destruction of property—I thought, and I still think, that that was a case in which this court should most properly interfere to prevent that solicitor *from issuing those scandalous libels which [588 were calculated to destroy the property of Mr. Dixon in a most important particular—his character and reputation; because without character and reputation he could not have carried on his business of a merchant. That I decided, and I do not find that the Lord Chancellor expressed any dissent from it, although he does express dissent from the general doctrine that this court can issue an injunction to prevent a libel. If, therefore, I am hampered in this case it is by what has been said by the Court of Appeal in the case of the *Prudential Assurance Company v. Knott*. In my own individual opinion I have not the slightest doubt whatever that it is, and it ought to be, as much the principle of

(¹) Law Rep., 10 Ch., 142; 11 Eng. Rep., 498.

this court to stop publications which go to destroy property as to prevent the darkening of ancient lights, or the trespassing upon property, or anything else which goes to the destruction of property; and if I were perfectly clear that the principles laid down in the case of the *Prudential Assurance Company v. Knott* (*) were no longer in force I should unhesitatingly, upon an interlocutory application, grant the injunction now asked, which, I repeat, is only an injunction to prevent unfair trading, to prevent the issuing of a falsehood to the detriment of another; and it ought, therefore, in my opinion, to be prevented; but if the law remains as pronounced by the Court of Appeal in the *Prudential Assurance Company v. Knott*, I am fettered; I am not at liberty to do that which I certainly would do if I were unfettered. But Mr. Higgins says I am relieved from the decision in the *Prudential Assurance Company v. Knott* now by the Judicature Act; and to show that, he has referred me to the 25th section, sub-sect. 8, of the Judicature Act, 1873, which is in these words: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just; and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the court shall 589] think fit, whether the *person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title, and whether the estates claimed by both or by either of the parties are legal or equitable." I certainly read that enactment as controlling the decision in the *Prudential Assurance Company v. Knott* (*).

If I had heard the case of the *Prudential Assurance Company v. Knott* I should have taken the same view of it as Vice-Chancellor Hall did. It was not a case for the interference of this court upon an interlocutory application. It was a totally different case from *Dixon v. Holden* (*), and a totally different case from that of *Springhead Spinning Company v. Riley* (*), which is one of my own decisions, where I was applied to for an injunction by the owners of

(*) Law Rep., 10 Ch., 142; 11 Eng. R., 498.

(*) Law Rep., 7 Eq., 488.

(*) Law Rep., 6 Eq., 551.

the Springhead Company—a company being large manufacturers and employing a great number of men, having a manufactory of great extent—against a trade combination—what is called a trade union. The manager of the trade union issued placards all about the neighborhood, warning the men that they were not to go to that place to work, and if they did (I think it went to this extent), their lives would not be safe. I took a view in the case which I still take—I may be fettered by a superior court—but although I am bound by that, I cannot surrender my own judgment. I decided against the trade union in that case, and I should decide the same way again if necessary. This court interferes wherever there is a threatened destruction of property. In that case there was a course adopted by the trade union which went to the total destruction of a valuable mill. They would not let the men go to work, and without the mill being at work it would have gone to destruction. I know by experience that my order worked most advantageously to all parties, because such is the implicit obedience paid to the orders of this court, that the trade union immediately desisted, the men went to work, and the mill, which up to that time had been useless, became immediately profitable. That is an instance of the beneficial application of the doctrine of this court.

*I am very much inclined to think that Mr. Hig- [590] gins is right in his construction of the 8th sub-section of sect. 25, in saying that it does arm the court with the power which possibly it had not before. I am very much inclined to think, upon the proper construction of that section, wherever the court sees that an injunction ought to be granted, it may be granted. I see very plainly in this case that an injunction ought to be granted, and I believe I am therefore at liberty under this sub-section to grant it, and I am not fettered by the case of the *Prudential Assurance Company v. Knott* ('). At the same time I am bound to say that it involves considerations of the highest possible importance. This is an interlocutory application, and, if nothing further took place, possibly at the hearing of the cause, if ever it is brought to a hearing, I may be able to give full effect to the view I express. I think, however, upon the whole, as the point is a new one, it is much better that I should not upon this interlocutory application interfere, but that I should reserve the question to the hearing of the cause. I therefore simply refuse the motion; but I will give the parties the opportunity, if they consider it of suf-

(') Law Rep., 10 Ch., 142; 11 Eng. Rep., 498.

ficient importance, of taking the matter before the Court of Appeal, and they can properly decide what I cannot decide, whether what was said in the case of the *Prudential Assurance Company v. Knott* is now law, or whether it is controlled and superseded by that section.

Upon the whole, therefore, I think the better plan is not to grant an injunction upon the interlocutory application, but simply to refuse the motion, but in such a manner as to make the plaintiffs' costs costs in the cause; but not the defendants', because under no circumstances are the plaintiffs to pay the defendants' costs. The defendants are the executors for Joseph Thorley, and they are in the hands of a highly respectable firm of solicitors, and now that this court has expressed its opinion upon this advertisement, and has said, as I do most distinctly say, that it is calculated to mislead, I should expect these persons, who can only desire to carry on trade in a fair way, to alter the advertisement and expunge that which is calculated to mislead, and to leave only that which is fair. That is the suggestion I make, and the defendants can act upon it or not, as they think fit.

591] **Higgins*: Will your Lordship, in the place of refusing the motion, allow it to stand over until the statement of claim is filed, which will contain an allegation of special damage, and then we can renew our motion?

MALINS, V.C.: I simply refuse the motion. When you have new materials you may renew the motion when you please.

Solicitor for the plaintiffs: *W. Eley*.

Solicitors for the defendants: *Collyer-Bristow, Withers & Russell*.

[6 Chancery Division, 591.]

V.C.M.; June 18, 1877.

SMITH V. CRABTREE.

[1878 S. 227.]

Construction of Will—Advances to Legatee—Set-off—Intention of Testator—Omission of Words.

A testator directed his trustees to pay his son £3,000 and to invest £28,000 upon trust as to £10,000 for his widow during widowhood, and as to six sums of £3,000 upon trust for his daughters and their children. The £10,000 was to fall into the residue at the death or marriage of his widow. And the testator directed his trustees to divide the residue into as many equal shares as he should have children living at the time of the death or second marriage of his wife, or then dead leaving

issue, and upon trust as to one of such shares to invest £1,000 for his son and his son's widow and children, and he gave directions as to the settlement of the share given to one of his daughters; and the will provided that any money advanced to his children and not repaid at his death should be set off against their share of the residue. The testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:

Held, that the legacy of £3,000 to the son was not to be set off against his debt, but was to be paid immediately:

Held, also, that the words in the will directing the residue to be divided between the children living "at the death or second marriage of his wife" must be struck out as being manifestly inconsistent with the form of the will and the intention of the testator; and that all the children living at the death of the testator took vested interests in the residue.

FURTHER consideration. William Smith, by his will, dated the 25th of April, 1871, gave his real and personal estate to trustees upon trust for sale and *conversion, [592 and to stand possessed of the proceeds upon trust, after payment of his debts and funeral expenses, to pay to his son Joseph Smith the sum of £3,000, and to invest the sum of £27,000 (increased by codicil to £28,000), and the trusts of the £28,000 were, as to £10,000, for the testator's widow during widowhood, and as to six sums of £3,000, upon trust for the benefit of the testator's six daughters and their children. The £10,000 was directed to fall into the residue at the death or second marriage of the widow, and the share of any daughter whose children did not take a vested interest was also to fall into the residue. The testator directed his trustees to stand possessed of the residue of his personal estate (and of all sums directed in certain events to form part thereof) upon the following trusts:

"Upon trust to divide the same into as many equal shares as I shall have children living at the time of the death or second marriage of my said wife (which shall first happen), or then dead leaving issue, and to stand possessed of one of such shares upon trust to invest £1,000 part thereof," and to hold the same upon trusts to pay the income to his son Joseph Smith and his son's widow successively for life, with remainder to Joseph's children. The will then proceeded as follows: "And I direct that my trustees shall pay the residue of such share (after deducting the said sum of £1,000) to my said son Joseph Smith: And I direct that my trustees shall stand possessed of another of the said shares upon the same trusts for the benefit of my daughter Elizabeth and her children, as are hereinbefore declared or referred to with respect to the sum of £3,000 hereinbefore bequeathed in trust for her and them, except the power of appointing the income thereof, or of any portion thereof, to her husband: And I direct that my trustees shall stand

possessed of the others of such shares upon trust to pay one thereof to each of my daughters (except my said daughter Elizabeth) living at the decease or second marriage of my said wife, which shall first happen, her executors, administrators, or assigns, and if any of my said daughters shall be then dead, leaving issue then living, upon trust to divide or pay the share of each daughter so dying, equally amongst all her children, or to her only child, his, her, and their executors, administrators, and assigns respectively."

593] *The will also contained the following clause:—

"Provided nevertheless that any sum or sums of money which I may have lent or advanced to or for the benefit of my said son, or any of my said daughters, or any of their present or future husbands, and which shall not have been repaid to me at the time of my decease together with all interest (if any) due thereon respectively, shall, if the amount thereof shall not exceed the amount of the share of residue to which such son or daughter shall be absolutely entitled under the bequests or trusts aforesaid, be taken in whole or part satisfaction thereof; and, if the amount thereof shall exceed the amount of such share, then I direct that my executors shall require payment from such son or daughter, or son-in-law, of the balance only of such debt and interest, after deducting the share of residue to which he or she shall be absolutely entitled as aforesaid."

The testator died in November, 1872, leaving his widow, his son Joseph, and his six daughters surviving, and they were all still living.

The testator advanced £4,000 to his son Joseph in January, 1870, and £500 in January, 1872; and such sums, with arrears of interest raising them to about £5,500, were still owing.

Under these circumstances the following questions arose:

1. Whether the executors were entitled to retain the legacy of £3,000 to the testator's son Joseph (the plaintiff) in part satisfaction of the debt due by him to the testator's estate.

2. Whether the plaintiff and the daughter Elizabeth took vested interests in the residue, or whether their shares were contingent on their surviving the testator's widow or dying in her lifetime, leaving issue.

3. As to the disposition of the surplus income of the residue during the widow's life.

On the first point,

H. Greenwood (Glasse, Q.C., with him), for the plaintiff: There is a clearly expressed intention to charge the ad-

vances to children upon their shares of residue, and the plaintiff is consequently entitled to immediate payment of his legacy of £3,000. *The testator knew he had [594 advanced £4,000 to his son before he made his will.

T. C. Wright, for Mrs. Shepherd (the daughter Elizabeth).

Dunning, for the other daughters, contra.

Chapman Barber, for the executors.

It appeared that the residue, if divided into sevenths, would amount to about £6,000 each share.

MALINS, V.C.: The testator, knowing he had advanced £4,000 to his son, expressly directed a legacy of £3,000 to be paid to that son, and deliberately directed all advances to his children to be charged upon their shares of residue. This is a sufficient indication of intention that the executors are not to retain the £3,000 in part satisfaction of the debt. Whether the share of residue is vested or contingent is immaterial, and the plaintiff is entitled to immediate payment of his legacy.

Upon the second point,

H. Greenwood (Glassey, Q.C., with him), for the plaintiff: The plaintiff takes a vested interest in one share of the residue less the £1,000 settled upon his wife and children. Such share must amount at least to one-seventh, and may amount to more. It is true that the division into shares is made dependent upon the number of children who survive the widow, or die in her lifetime leaving "issue," which here means "children." But the testator has expressly declared trusts of two shares in favor of his son, the plaintiff, and his daughter Elizabeth (Mrs. Shepherd). As regards the plaintiff there is no contingency. His share is given absolutely; and even if he should die without issue in the lifetime of the testator's widow, his own widow, if surviving, will be entitled to the income of £1,000 part of his share. Moreover, there is no gift over to his children as in the case of the daughters' shares; nor is his own share liable, in certain events, to *fall into the residue like Mrs. Shepherd's. [595 It is a simple, absolute gift to him of one share, less £1,000. Mrs. Shepherd stands upon much the same footing; but the shares of the other daughters are contingent upon their surviving the widow or leaving issue "then living"; and it is observable that these words are not in the clause directing the division; and the court will not insert them in such a case as this: *Martin v. Holgate* (*). Therefore, if any daughter (other than Mrs. Shepherd) happens to die, leaving children, who survive their mother but die before the testator's

(*) Law Rep., 1 H. L., 175, 185, 187.

widow, such children will be taken into account in determining the number of shares into which the residue is to be divided, but will not be entitled to a share. The consequence would be that the residue would be divisible into more shares than the number of beneficiaries. In fact, the direction for division is inconsistent with the disposition of the shares; and where this is the case, and the inconsistent direction is evidently, as here, a mistake, the court will say that it must be controlled by the subsequent disposition: *Berkeley v. Palling* (¹). The testator never contemplated or provided for the event of the plaintiff's death in the widow's life; he assumed that he would take a vested interest in one share (less £1,000) upon the testator's death. The case falls within the principles laid down by Lord Justice Knight Bruce in *Key v. Key* (²), where it was held that the spirit must overcome the letter where the letter is evidently inconsistent with the intention. No life interest in the residue is given to the widow, and there is no reason for directing it to be tied up until her death. All the testator's children survived him, and are still living; and a declaration that the residue became divisible among them in sevenths at his death would be satisfactory to all parties.

T. C. Wright, and *Dunning*, for the daughters.

Chapman Barber, for the executors.

MALINS, V.C.: The evident intention of the testator was that all the children should have shares in the residue, 596] which cannot be the case if *these words are to stand. The passage in which the testator disposes of his residue is this: "Upon trust to divide the same into as many equal shares as I shall have children living at the time of the death or second marriage of my said wife (which shall first happen) or then dead leaving issue." It is clear to me that those words referring to the period of the death or second marriage of his wife were inadvertently thrown in. Looking at the whole form of the will the words are manifestly inconsistent with the intention, and must have been inserted by mistake. If I strike out the words, and read the passage thus, "Upon trust to divide the same into as many equal shares as I shall have children living, or then dead leaving issue," the whole will will be consistent, and will be in strict accordance with the intention of the testator. Can I then strike out these words? In *Surtees v. Hopkinson* (³) I reviewed the cases upon the subject, and then came to the conclusion that I should have been justified in departing from the strict language of the will in order to effectuate the

(¹) 1 Russ., 496.

(²) 4 D. M. & G., 78, 84, 85.

(³) Law Rep., 4 Eq., 98.

manifest intention, if the language had been inconsistent with that intention. I am not aware that my observations in that case have been dissented from, and there is a case, recently decided in the Court of Appeal, that of *Greenwood v. Greenwood* (¹), in which important words were added to a will by the Lords Justices on the ground that they had evidently been omitted by mistake. I think upon these authorities I am deciding strictly in accordance with the authorities—though it is a strong decision—that those words should be omitted, and that all the seven children who survived the testator are entitled to vested interests in the residue.

Solicitors for plaintiff: *H. B. Clarke & Son.*

Solicitors for defendants: *Bell, Broderick & Gray.*

(¹) 21 Sol. J., 630.

[6 Chancery Division, 597.]

V.C.M., July 3, 1877.

*SHEPHEARD V. BEETHAM.

[597

[1872 S. 147.]

Charity—Mortmain—Pure and Impure Personality—Premium upon granting a Lease—Costs—Marshalling Assets.

A testatrix bequeathed to an hospital all her household furniture and other things in her dwelling house, and also all her ready money, money at the bankers, and money in the public stocks or funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property, real or personal:

Held, that the charitable bequest was a specific bequest, and that the debts, funeral and testamentary expenses, and costs, must be paid first out of the undisposed of personal estate, next out of the real estate, and lastly out of the specific bequest; but that the specific bequest must exonerate the real estate from probate duty.

The testatrix, long before her death, had granted a lease of a house for thirty-one years at a low rent, with a premium of £600, which had not been paid:

Held, that the unpaid premium being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity.

CORDELIA ANGELICA READ, by her will, dated in December, 1858, gave and bequeathed to the treasurer for the time being of the Hospital for the Cure of Consumption at Brompton, Middlesex, for the use of the said institution, all her household furniture, pictures, goods, chattels, trinkets, jewelry, and effects which might be in her dwelling house in which she might reside at the time of her decease, and also all her ready money, money at the bankers, and money in the public stocks or funds of Great Britain, and also all other of her personal estate and effects which she could by

law bequeath to such an institution. And she appointed T. J. Annetts (since deceased) and the plaintiff Charles Shepherd, solicitor, executors of her will.

The testatrix died in December, 1871, a spinster, and at her decease her personal estate amounted in value to upwards of £100,000, and she was seised of or entitled to real estates of the value of between £40,000 and £50,000.

598] *This bill was filed to administer the estate of the testatrix, and for an account of the rents and profits of the real estate which had been taken possession of by the heir-at-law of the testatrix.

In the year 1857 the testatrix had contracted to grant a lease of a public house to two persons named Walker at a rent of £50 per annum, with a premium of £600. The lessees entered into possession, but the premium had never been paid, nor had the rent of the house. And it was stated by the lessees that the money had never been asked for.

The questions now raised upon further directions were: First, whether the premium of £600 was money arising from an interest in land, and therefore whether it came within the Statute of Mortmain, or whether it was pure personalty and was capable of being left to a charity? Secondly, out of what funds the debts, funeral and testamentary expenses, and costs, were to be paid?

Higgins, Q.C., and *E. Beaumont*, for the heir-at-law, on the first question: We submit that the unpaid premium upon the public house was not pure personalty, but was an interest arising out of land, and consequently that it is within sect. 3 of the Mortmain Act (9 Geo. 2, c. 36), and is not capable of being left to a charity. If the testatrix had agreed to sell the house out and out, the unpaid purchase-money would have been an interest arising out of land, and there would have been a lien upon the land for the money. The actual rent is not within the statute, *Brook v. Badley*⁽¹⁾; but the premium is in the nature of purchase-money. The rent of £50 was a very inadequate sum, and the £600 premium being the same as purchase-money, must form part of the undisposed of personalty, and go to the next of kin of the testatrix. The interest of the heir-at-law in this question is to increase the undisposed of personalty, which is small, in order to save the real estate from the liability as to debts and funeral expenses, which might otherwise be more than the personalty would be able to pay.

Glasse, Q.C., and *Cracknall*, for the persons entitled to

(¹) Law Rep., 4 Eq., 106.

the undisposed of personalty, followed the same line of argument.

**J. Pearson*, Q.C., and *F. C. Norton*, for the [599 Brompton Hospital: This premium was a personal debt due to the testatrix, and nothing more. The means of recovering it would be by a personal action against the Walkers, and there is no question of lien arising: *Edwards v. Hall* (').

Humphry and *Beetham*, for some of the next of kin.

Higgins, in reply.

MALINS, V.C.: The point I have to decide is this: The testatrix bequeathed to the treasurer of the Brompton Hospital all the goods and chattels in her dwelling house, and also ready money, money at the bankers, and money in the funds, and all other personal estate and effects which she could by law bequeath to such an institution. Under this bequest the hospital will, it is said, be entitled to about £100,000, and they have already had £80,000 on account; but it happens that the testatrix, having died in 1871, entered into a contract in 1867 with two persons named Walker to grant a lease to them for thirty-one years of a public house, in consideration of a rent of £50 per annum and a premium of £600. The lessees shortly afterwards entered into possession of the house, but they have not up to the present time paid any rent, nor have they paid the £600 premium, nor interest upon that sum. It is said they have not been called upon to pay the money, but however that may be, the question now arises whether the unpaid premium is money which the testatrix could legally bequeath to a charitable purpose. That the money is part of her personal estate no one disputes, but does it form part of her pure personalty which might be left to the hospital? It is quite clear that in the case of a mortgage upon land, the mortgage money, being a lien upon land, could not be left to a charity. That is not disputed. On the other hand, rent is not a lien upon land, because the remedy for the recovery of the rent is by distress on the chattels or by re-entry. So that rent might be given to a charity. Then, again, *unpaid purchase-money cannot be so given, [600 because the vendor has a lien upon the land, and consequently it is within the Statute of Mortmain. Now is this money, rent? if so, it is not within the statute. In the case of *Brook v. Badley* (') the Master of the Rolls decided that a surface rent to be paid by half-yearly instalments for such part of the minerals as should be gotten by the lessees, with

(') 6 D. M. & G., 74.

(') Law Rep., 4 Eq., 106.

powers of distress and re-entry in default of payment, was not within the statute, and could be given for charitable purposes.

Edwards v. Hall ⁽¹⁾ also decided that arrears of rent could be given to a charity. If, therefore, this money is in the nature of rent, it does not come within the statute. It certainly cannot be distrained for, and there is no power of re-entry upon non-payment. It has, in fact, no incident of rent attached to it. Then what is it? A lessee is a purchaser *pro tanto*, he is treated as a purchaser so far as his interest goes. Suppose a man purchased the remainder of a lease for £600, that money would be purchase-money for the lease. You cannot call it rent because a lessor can distrain for rent.

The principle is the same whether the lessor receives rent and purchase-money or whether he receives purchase-money only. In my opinion, money paid by way of premium for a lease is in exactly the same position as purchase-money, whether there was a rent reserved together with the premium or not. Suppose the lessees had sold the lease, the purchaser must have known that the premium was unpaid. What remedy, then, would there have been for the recovery of the premium? There would have been no privity of contract between the original lessor and the purchaser from the lessees, and privity of estate there was none, therefore he must have recovered the premium by action for sale in respect of his lien.

Here there was a lease for thirty-one years, and the rent, as well as the premium and interest, was left unpaid for fourteen years, and the legal personal representatives of the testatrix would have been entitled to say, "We have a lien on the land for the amount of the premium."

Then it necessarily follows that the premium is purchase-
601] money *as far as it goes. In Lancashire there is a custom of fee farm rents, where half the money is usually paid in rent and half in an immediate payment. It cannot be denied that in such cases there is a lien upon the land for the cash payment. In this case, the rent reserved of £50 must have been less than the full value of the house, and the £600 must have been solely in the shape of premium. The premium was the same as purchase-money, and the lessor *pro tanto* has a lien for that purchase-money. Therefore the unpaid premium comes within the Statute of Mortmain, and could not be left for a charitable purpose.

The case was then argued upon the questions, first,

(1) 6 D. M. & G., 74.

whether the gift to the Brompton Hospital was a specific legacy, and secondly, out of what fund and in what proportions the debts, funeral expenses and costs, and the probate duty, were to be paid.

Glasse, Q.C., and *Cracknall*, upon the second question: Where there are two funds, one of pure personalty and another of impure personalty, the debts, funeral expenses, and costs, must be apportioned ratably between the two funds: *Taylor v. Linley* ⁽¹⁾. The whole residue ought therefore to bear the costs: *Eyre v. Marsden* ⁽²⁾. Part of the personalty being undisposed of does not affect the rule.

Where there is a gift of residue to be divided among certain classes of persons, the costs of ascertaining who is entitled are payable out of the whole residue before it is divided: *In re Reeve's Trusts* ⁽³⁾.

Humphry and *Beetham*, for the next of kin: This is a residuary bequest to the charity, and the residue means the personal estate which remains after payment of a testator's debts, funeral and testamentary expenses, and costs. That was decided in *Elborne v. Goode* ⁽⁴⁾; *Shuttleworth v. Howarth* ⁽⁵⁾; and *Trethewy v. Helyar* ⁽⁶⁾.

**J. Pearson*, Q.C., and *F. C. Norton*, for the hos- [602
pital: This question was decided in *Taylor v. Mogg* ⁽⁷⁾. There a testator directed his executors to pay so much of his residuary personal estate as they could by law dispose of for charitable purposes, and made no further disposition of the residue, and it was held that the costs of a suit to administer the testator's estate ought to be paid out of the residuary personal estate inapplicable by law to a charitable purpose, and consequently undisposed of by the will. If the impure personalty is not sufficient, then the rest must be borne by the real estate. The rule that real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of applies equally to real estate which descends by reason of lapse, and to that as to which no disposition has been made: *Scott v. Cumberland* ⁽⁸⁾.

But there is another view of the case, which is that the bequest to the charity is a specific bequest, in which case the specific legacy must be exonerated from all the debts, funeral and testamentary expenses, and costs, and they must be borne in the first instance by the undisposed of personalty, and then by the undisposed of real estate.

⁽¹⁾ 5 Jur. (N.S.), 701.

⁽²⁾ 4 My. & Cr., 231.

⁽³⁾ 4 Ch. D., 841.

⁽⁴⁾ 14 Sim., 165.

⁽⁵⁾ Cr. & Ph., 228.

⁽⁶⁾ 4 Ch. D., 53; 19 Eng. R., 662.

⁽⁷⁾ 27 L. J. (Ch.), 816.

⁽⁸⁾ Law Rep., 18 Eq., 578; 11 Eng. R., 546.

Higgins, Q.C., urged that at any rate the probate duty should not fall upon the heir-at-law.

MALINS, V.C.: The rules are clear that if a man gives his estate generally for charity, that would only be good as to so much of the estate as should be pure personalty. In that case there would be an apportionment of the costs and expenses between the pure and impure personalty. That was decided in *Taylor v. Linley*⁽¹⁾, but this case has been treated as the gift of a specific legacy to the charity. If so, the general estate would bear the debts, funeral expenses, and costs, so far as it is sufficient. Is it, then, a specific legacy? The testatrix does not dispose of her general estate, but she gives certain household furniture and other chattels, and all her ready money, money at the bankers, and money 603] in the *funds. That is so far, by the terms of the will, a gift of certain specific articles. And then she says, "and also all other of my personal estate and effects which I can by law bequeath to such an institution." There is no other bequest, and the will is silent as to all but what she can dispose of to charity.

My opinion is that there is only one bequest, which is a specific legacy. It is true it was uncertain what was the amount of property which would be comprised within those words, but that does not prevent it from being a specific legacy.

Then, having decided that this is a specific bequest, it follows that, as between the specific legatee and the undisposed of personal estate, the latter must bear the debts, funeral and testamentary expenses, and those will be all the testamentary expenses in establishing the will, and it will include not only the expenses of proving the will, but also the probate duty. But when I come to the real estate, there is a clear difference as to the liability. The real estate goes to the heir by descent, and though he must be liable to the debts of the testatrix, it is not just that he should pay the probate duty, because, as he does not take under the will, he can have no interest in the will being proved.

If, therefore, the undisposed of personal estate is insufficient for the payment of probate duty as well as debts, funeral expenses, and costs, I think those who take the property ought to pay the remainder of the probate duty. Consequently the debts, funeral and testamentary expenses, and costs, must first come out of the undisposed of personal estate, and if that is not sufficient, the surplus must come out of the real estate. The undisposed of personalty must

(1) 5 Jur. (N.S.), 701.

also pay the probate duty, but if that is insufficient the surplus must be paid by the Brompton Hospital.

Solicitors: *Norton, Rose, Norton & Brewer; A. J. & B. Shephard; Cowlard; H. W. Davie.*

[6 Chancery Division, 604.]

V.C.M., July 8, 1877.

***BESANT v. COX.**

[604

[1878 B. 264.]

Construction of Will—Executory Gift over—Death without leaving Issue—Restriction to Period of Distribution.

A testatrix devised lands to her daughter S. for life, with remainder to the husband of S. for life, and after the death of the survivor of them to all the children of S. by her then husband who should be living at testatrix's death as tenants in common in fee, and added a proviso giving over the shares of any of the children of S. who should "depart this life without leaving lawful issue" to the survivors or survivor of the children that should leave such lawful issue as tenants in common in fee:

Held, that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz., the death of the surviving tenant for life.

O'Mahoney v. Burdett ⁽¹⁾ and *Ingram v. Soutten* ⁽²⁾ distinguished.

ELIZABETH SHEPPARD, by her will, dated in July, 1841, gave and devised a public house and brewery together with various erections and buildings belonging thereto, unto and to the use of her daughter Sarah Cox, the wife of John Cox, and her assigns for life, and after her decease the testatrix gave and devised the same unto and to the use of John Cox, the husband of Sarah Cox, and his assigns for life, and after the decease of the survivor of them she gave and devised the same hereditaments and premises in the following words: "Unto and to the use of all and every the children of my said daughter by her said present husband that shall be living at the time of my decease, and to their respective heirs and assigns forever as tenants in common. Provided always, and my will further is, that in case any or either of my said grandchildren shall depart this life without leaving lawful issue, then and in such case I give and devise the parts or shares or part or share of them, him, or her so dying without leaving lawful issue as aforesaid of and in the said hereditaments and premises unto the survivors or survivor of them my said grandchildren that shall leave such lawful issue, and to their heirs and assigns forever as tenants in common."

⁽¹⁾ Law Rep., 7 H. L., 388; 12 Eng. R., 22.

⁽²⁾ Law Rep., 7 H. L., 408; 12 Eng. R., 40.

605] *The testatrix died in May, 1843. There were six children of John and Sarah Cox living at the death of the testatrix. One died an infant in 1851 without issue; another died in 1852 leaving three children; a third died in 1859 leaving five children; a fourth died in 1862 leaving three children.

John Cox died in August, 1866, and his wife Sarah Cox in May, 1867. Of the remaining two children one died in January, 1873, without having had any issue, and the sixth child was the plaintiff, who had five children.

This suit prayed that there might be a partition or sale of the property, and that the rights of the parties might be ascertained and declared.

The plaintiff was the sole beneficiary under the will of the child who died in 1873, and the share of the latter, therefore, if vested and not given over by the divesting clause, passed to the plaintiff.

Higgins, Q.C., and *Rowden*, for the plaintiff: We contend that the words of the proviso, "depart this life without leaving lawful issue," must be restricted to death without issue at the death of the surviving tenant for life, which is here what may be called the period of distribution. The court always leans against the postponement of absolute vesting. Up to the time when *O'Mahoney v. Burdett* (*) and *Ingram v. Soutten* (*) were decided no doubt could have arisen upon the construction of this proviso, the rule which was known as the 4th rule in *Edwards v. Edwards* (*), viz., that words indicating death without leaving a child must be construed to refer to the occurring of that event before the period of distribution, being well established by a long series of decisions. It is a mistake to suppose that this rule has been absolutely overruled by *O'Mahoney v. Burdett* (*) and *Ingram v. Soutten* (*). The judgment of Lord Hatherley in *O'Mahoney v. Burdett* states the true rule, that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition. 606] *Here we say the difficulty of ascertaining to whom the shares divested by the proviso pass under its terms is a circumstance which shows that its whole operation must be restricted. The recent case of *Olivant v. Wright* (*) clearly shows that the cases in the House of Lords have not absolutely overruled the old rule. In that case the opera-

(1) Law Rep., 7 H. L., 388; 12 Eng. R., 22.

(2) Law Rep., 7 H. L., 408; 12 Eng. R., 40.

(3) 15 Beav., 357.

(4) 1 Ch. D., 346; 12 Eng. R., 779.

tion of an executory devise was restricted in the way contended for by us here.

Cozens-Hardy appeared for the representatives of the child who died in 1851 without issue.

Glasse, Q.C., *Jemmett*, and *Phear*, for the representatives of the three children of Sarah Cox who had died leaving children: The rule known as the 4th rule in *Edwards v. Edwards* (1) is overruled by the decisions in *O'Mahoney v. Burdett* (2) and *Ingram v. Soutten* (3), and death without issue will be construed to mean death without issue at any time. This was always the natural meaning of the words, and the cases in the House of Lords establish that the natural meaning is not, except under special circumstances, to be departed from. Here there are no such special circumstances. *Olivant v. Wright* was a different case, for there there was a gift over of a child's share in the event of his leaving issue as well as in the event of his dying without issue.

MALINS, V.C.: By the first devise in the will it is perfectly plain that the gift was to the daughter for life, then to the husband for life, and then to the children of the daughter by the husband living at her decease—that is, at the time of the decease of the testatrix—their heirs and assigns, as tenants in common, so that no after-born children of the daughter could take.

Then comes this proviso, upon which the whole question turns: "Provided always, and my will further is, that in case any or either of my said grandchildren shall depart this life without leaving lawful issue, then and in such case I give and devise the parts or shares or part or share of them, him, or her so dying *without leaving lawful [607 issue as aforesaid of and in the said hereditaments and premises unto the survivors or survivor of them my said grandchildren that shall leave such lawful issue, and to their heirs and assigns forever as tenants in common." Now this is open to two constructions. One is—and this has been contended for by Mr. Glasse, Mr. Jemmett, and Mr. Phear—that this is a proviso to come into operation whenever any of the grandchildren die, the consequence of which would be that every grandchild, including the present plaintiff (who is the survivor of all the grandchildren), whether of the whole or part, is tenant in fee with an executory devise over to those who should die leaving lawful issue. Now, if this is intended to apply to the whole life

(1) 15 Beav., 357.

(3) Law Rep., 7 H. L., 408; 12 Eng.

(2) Law Rep., 7 H. L., 388; 12 Eng. R., 40.
R., 22.

of the devisees, the grandchildren, nothing can be more absurd than that, because they can none of them do anything with the property; they cannot sell it, they cannot settle it, they cannot mortgage it, they can do nothing with it during the whole of their lives; and then the gift over is not to the survivor, but only to those who die leaving issue. So that, suppose they are reduced to two, and one of the two dies without issue, the other living, the other cannot take, because there is no gift except to those who die leaving issue and that at the time of the death of the first child without issue. A more absurd will, in that view of the case, can hardly be made.

To that construction, therefore, I am entirely opposed. But then there is another construction, absurd as the will may be, which will do more justice, and which is in accordance with the rules of this court, which say that in all cases of vesting properties you must make it vest absolutely as early as possible; and in all these gifts over, which have produced the inconsistency pointed out, when they are to be during the whole lives of the devisees, the rule is to cut them down and to make them operate as early as possible. Therefore, in the common case, the gift to a class of persons and the survivors or survivor of them means the survivors or survivor at the death of the testatrix. A gift for life with remainder to a class of persons and the survivors means those who survive the period of division on the death of the tenant for life. Now in this case the will was, "that in case any or either of my said grandchildren shall depart 608] this life without leaving *lawful issue," then the shares were to go over. There it is reasonable enough, because at the death of the daughter you can ascertain which are then dead with and which without issue; and so at that period you determine who are the objects of the testatrix's bounty.

It has been contended that the case of *O'Mahoney v. Burdett* (') is opposed to these obvious and thoroughly settled rules of construction. Now *O'Mahoney v. Burdett*, as I read it, decides merely this, that wherever there is a gift in fee with an executory devise over upon the death of the first taker without issue, that gift over will take effect at the death of the devisee, unless a contrary intention appears by the will. But if upon the whole will the court collects the contrary intention, it leaves it entirely open to the court to put a construction upon it which will effectually carry into effect the obvious intention of the testatrix. Now

(') Law Rep., 7 H. L., 388; 12 Eng. R., 22.

what was the intention of this testatrix? Why, to give to her daughter and husband for life, with remainder to the children of the daughter by that particular husband, as a class of persons; but she thought to herself, some of them may survive, and some may not—some may die without leaving issue, and some may die leaving issue. As to those who die without leaving issue, their shares shall go over; as to those who die leaving issue, their shares shall remain. That is the obvious intention. It vests property at a much earlier period; it makes the property useful to the family who take it, instead of tying it up for an indefinite period, namely, during the whole of their lives it may be, without power of alienation. I collect, therefore, from this will the contrary intention to that in the will in the case cited, and therefore it is, in my opinion, taken out of the rule in *O' Mahoney v. Burdett*.

But a very recent case since *O' Mahoney v. Burdett*, viz., the case of *Olivant v. Wright* (¹), which was decided by the Court of Appeal in November, 1875, has been cited, and, in my opinion, entirely supports the construction which I put upon this will, and is undistinguishable from it. Now what was the will in that case? It was this: "I give and bequeath unto my husband James Nicholson all my real and personal property, whether houses, land, or whatever else I am entitled to from my late aunt's estate, and all *other effects belonging to me, wheresoever they may [609 be at the time of my decease, during his natural life, to receive all the rents, interest, and profits arising from them for his own use, and after his decease to be divided amongst my five children share and share alike, and if any of my children should die without issue, then that child or children's share shall be divided share and share alike among the children then living, but if any of my children should die leaving issue, then that child (if only one) shall take its parent's share, and if more than one, to be divided equally amongst them share and share alike." In that case it names the number of children, but in the present case it is indefinite—"all the children living at the death of the testatrix, and if any of my children shall die without issue." Now what was the construction put on the words "if any of my children should die without issue"? That was held to mean, if any of them should die in the lifetime of the tenant for life without issue; the consequence of which was that those who survived the tenant for life took absolutely, and the property could then be divided because the interests were

(¹) 1 Ch. D., 846.

1877

West of England and South Wales Bank v. Nickolls.

V.C.M.

absolute. No less than four judges, Lord Justice James, Lord Justice Mellish, Lord Justice Bramwell, and Lord Justice Brett, gave judgment in that case, and they all were bound, as I am bound, by *O'Mahoney v. Burdett* (*). But *O'Mahoney v. Burdett* leaves the question open. Every will must be construed according to the intention of the testator, and I am satisfied on the language of this will, as the Lords Justices were in *Olivant v. Wright* (*), that the intention of the testatrix was not to tie up the devisees during the whole of their lives, rendering the property inalienable and comparatively useless as long as they lived, but only to tie it up till the time the division took place, namely, the expiration of the life estate. I entirely concur in the decision in *Olivant v. Wright*. I am unable to distinguish this case from it, and both on the authority of that case, and upon the old and settled rules of this court, I am of opinion that the intention was to vest this property and make it alienable at the earliest possible moment, and I am of opinion that the property vested in such of the children as survived the parents whether they had or had not issue. 610] The share of the infant child who *died before the death of the tenant for life will go over, so the division will be in fifths at the death of the tenant for life; the five children are absolutely seised in fee; the death without leaving issue I hold to mean in the lifetime of the daughter who was the surviving tenant for life. The declaration, therefore, will be that the property vested in fifths, without regard to whether the five had or had not issue. They are tenants in common in fee each of one fifth.

Solicitors for plaintiff: *Pownall, Son, Cross & Knott*.

Solicitor for defendant: *Sowton*.

(*) Law Rep., 7 H. L., 388; 12 Eng. R., 22. (*) 1 Ch. D., 346; 15 Eng. R., 779.

[6 Chancery Division, 613.]

V.C.M., June 28, 1877.

613] *WEST OF ENGLAND AND SOUTH WALES BANK V. NICKOLLS.

[1876 W. 374.]

Discovery—Redemption Suit—First and Second Mortgagees—Interrogatories—Particulars of Property.

In a redemption suit by a second mortgagee against the first mortgagee the defendant is bound to state in answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt.

THIS was an action for redemption filed by the West of England Bank, who were second mortgagees of certain property, against the defendants, the Gloucestershire Banking Company, who were first mortgagees of the same property. The plaintiff had filed interrogatories calling upon the defendants to set forth a list and short particulars of all the securities which at the date of the institution of the action they held for their mortgage debt; and the particulars of any dealings by them with such securities since the commencement of the action; and also what sum of money was owing on their securities; and they further required particulars showing how much was for principal, and how much for commission, interest, and costs.

The defendants answered that part of the interrogatory in which they were asked to set forth the amount due for principal, interest, and costs, but decline to answer further. The plaintiffs excepted to the defendants' answer to the interrogatories, on the ground that they ought to have set forth whether they held any securities for their debt other than the securities held by the plaintiffs, and what was the nature of such other securities, if any.

Glasse, Q.C., and *Romer*, for the plaintiffs: The defendants refuse to set out what securities they hold for their debt. It may be that they have another security in addition to the security upon which our debt is charged. In that case we *should be bound to redeem both securities, and we require to know what the securities are in order to decide whether it is worth our while to redeem. When a defendant submits to answer, he is bound to answer fully, unless he can make out an exceptional case, viz., that the discovery sought is vexatious or oppressive. This has been laid down as the rule in many cases, of which *Marquis of Donegal v. Stewart* ⁽¹⁾ and *Saull v. Browne* ⁽²⁾ are examples. The rule as to answering applicable to redemption suits is the same as for any other suits for account, and a defendant in a redemption suit cannot refuse to set out in his answer his accounts as mortgagee: *Elmer v. Creasy* ⁽³⁾; *Brookes v. Boucher* ⁽⁴⁾. That principle is quite as applicable to the information we require, without which we cannot tell whether we ought to redeem or not.

J. Pearson, Q.C., and *Speed*, for the defendants: The plaintiffs may have a claim to know what amount is due on our mortgage, but he cannot have a right to see our deeds. A mortgagee is entitled to sit upon his deeds, just

⁽¹⁾ 3 Ves., 446.

⁽²⁾ Law Rep., 9 Ch., 364.

⁽³⁾ Law Rep., 9 Ch., 69.

⁽⁴⁾ 8 Jur. (N.S.), 639.

as much as the owner of an estate, and he is not to produce them until the mortgagor, or, as in this case, the second mortgagee, comes forward with his money and offers to pay the money due. It was held in *Chichester v. Marquis of Donegal* ⁽¹⁾ that the mortgagees could not be ordered to produce the deed of settlement, or to give any discovery in relation to it. In that case Lord Justice Giffard said: "I take the rule of the court, right or wrong, to be, that if a mortgagor executes a mortgage and hands over the title deeds, he cannot see those title deeds after the mortgage has become absolute without paying the mortgagee his principal, interest, and costs." And in *Vint v. Padgett* ⁽²⁾ it was held that where two mortgages of different estates were assigned to one mortgagee as a security for one gross sum, one estate cannot be redeemed without both being redeemed.

Glasse, in reply.

615] *MALINS, V.C.: The Gloucestershire Banking Company, who are the defendants here, are the first mortgagees of a property, which for my purpose it is quite sufficient to call Blackacre. The West of England Bank, who are the plaintiffs, are the second mortgagees of Blackacre only, and, as second mortgagees, they have a right to redeem the Gloucestershire Banking Company. They have accordingly brought a redemption action—second mortgagees against first mortgagees. In that action they have put in interrogatories, and all agree that under such circumstances the first mortgagee is bound to say what he claims to be due to him for the purpose of enabling the second mortgagee to decide whether it is worth his while to prosecute the action for redemption. I proceeded upon that principle in the case of *Elmer v. Creasy*, because I find from the report of the case before me in the Law Journal ⁽³⁾, that I stated "I was not satisfied with the answer, which seemed to be evasive, inasmuch as it stated the existence of the lease of 1861, but omitted to state the amount of rent reserved by it." That is only a very short account of the judgment I gave. I believe my judgment was much fuller than that, but the ground of my decision was that the mortgagee was bound in a general manner to state what he believed to be due to him to enable the second mortgagee to decide whether it was worth while to redeem or not. In this case the defendants either have or have not additional security besides Blackacre. It is perfectly clear that if they do hold two securities the mortgagor could not redeem one without

⁽¹⁾ Law Rep., 5 Ch., 497, 502.

⁽²⁾ 1 Giff., 446; 2 De G. & J., 611.

⁽³⁾ 42 L. J. (Ch.), 807.

redeeming the other. It is also equally clear that if the one security has been expressly mortgaged to them for a particular debt, and then there has been an equitable mortgage for another debt, neither the mortgagor, nor any one claiming under him, can redeem one property without redeeming both. They are entitled to hold all the property for their debt, and the mortgagor can only redeem upon paying all that is due. In this case they say there is £3,093 due to them. If they hold no other security than that of which the plaintiffs are second mortgagees, it may not be worth the while of the plaintiffs to redeem. Rather than do so, they probably would dismiss their action with costs. But suppose, in addition to Blackacre, *of which the sec- [616] ond mortgagees are also mortgagees, the first mortgagee holds a security of Whiteacre, it may be that Whiteacre is worth all the money. Suppose, for instance, that Whiteacre is worth £4,000, and the answer is, We claim to have due to us £3,093, the security we claim is Blackacre, and also Whiteacre, situate at such a place and of such an extent—and I do not see why they should not say of what value—then the second mortgagee knows whether it is worth his while to redeem or not. If the value is not stated, he can make inquiries. He can say, Blackacre is worth less than I have got to pay, but, taking the two together, I shall be secure if I redeem the Gloucestershire Bank, and pay everything due to them. If the mortgagor paid them off the £3,093, he would be entitled to take out of their hands every security they hold, and all rights which the mortgagor has are conferred on the second mortgagee.

Then, upon the point of convenience and inconvenience, what harm will it do to the first mortgagee to say whether he holds any other security than that on which the second mortgagee holds a lien? Mr. Pearson argued it as if it were a question of looking at his deeds. That is not claimed. I quite agree with the decision of Lord Justice Giffard in *Chichester v. Marquis of Donegal* (¹), that without paying the mortgagee off a mortgagor has no right to look at the deeds, and I desire it to be understood that if the Gloucestershire Bank say, We have a security on Blackacre, of which you have also a security, and we have a security on Whiteacre, on which you tell me you have not a security, there is no right in the West of England Bank to look at any of the deeds; the Gloucestershire Bank have a right, to use a common expression, to sit on their deeds; but there is a very great convenience in carrying the principle upon which

(¹) Law Rep., 5 Ch., 497, 502

Elmer v. Creasy ⁽¹⁾ was decided to the extent of saying that the mortgagee must disclose whether he holds any other security than that which the second mortgagee holds, for the same reason, to enable the second mortgagee to decide whether it is worth his while to redeem or not. I think that is borne out by the judgment of Vice-Chancellor Wood in [617] *Brookes v. Boucher* ⁽²⁾, where the suit was *to establish breaches of trust, and where it was no use going on with the suit if the trustee had left no estate to answer the breaches of trust. Therefore the defendants were bound to state in general terms what the amount of the estate was, to enable the plaintiff to decide whether he would go on with the suit or not.

Elmer v. Creasy went before the Court of Appeal, and the decision of the court was given by Lord Selborne, who, in his judgment, puts this qualification, which I am bound to follow, and which I do follow. He says ⁽³⁾: "We are not now called upon to determine whether the defendant must, in answer to these interrogatories, set forth as full and detailed a statement of all the items of the account as he might be obliged to give under a decree for redemption. The court may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively: *Reade v. Woodroffe* ⁽⁴⁾". But the present question is, whether the defendant is entitled to refuse to answer at all before decree as to these matters? The Vice-Chancellor has decided that he is not, and with that decision we agree. The appeal must be dismissed with costs." Therefore I only go a little further in saying that, for the reasons I stated, it is a matter of convenience to the second mortgagee to know not only the amount due, but also the securities held, and I am unable to see that it can be of the slightest disadvantage to the first mortgagees. I do not accede to the application that they are bound to set out the minute details of the account, nor state the value of the property; but I think they are bound to state the security they hold. Suppose they hold a bond, if they say we hold a security on the same property as you, and, in addition to that, we have the bond of A. B. for a certain amount—if they know A. B. they can estimate the value; and if they

⁽¹⁾ Law Rep., 9 Ch., 69; 8 Eng. R., 735.

⁽²⁾ 8 Jur. (N.S.), 639.

⁽³⁾ Law Rep., 9 Ch., 78; 8 Eng. R., 738.

⁽⁴⁾ 24 Beav., 421.

do not, they can inquire who A. B. is, and when they find out, it may be worth their while to redeem. Therefore it seems to me, upon principle, that the summons is right. What is the form of the summons?

**Glasse:* For a further and better answer, but, [618 according to your Lordship's judgment, it goes too far. I propose to put it generally that the defendants are to set forth what security they hold, and that the costs should be costs in the cause.

MALINS, V.C.: I think that is fair, as you were partly successful and partly unsuccessful. Besides which, the summons raises a point that does not seem to have been very distinctly decided anywhere.

Solicitors for plaintiff: *Clarke, Woodcock & Ryland.*

Solicitors for defendants: *Vizard, Crowder & Anstie.*

The right of substitution or subrogation is a purely equitable one, and the extent to which it will be exercised depends upon the circumstances of the case: *Matter of Hewitt*, 25 N. J. Eq., 210; *Bigelow v. Cassidy*, 26 N. J. Eq., 557; *Matthews v. Aikin*, 1 N. Y., 595.

Though courts of law will recognize the right: *Boyd v. McDonough*, 39 How., 389; *Lafarge v. Herter*, 11 Barb., 159, 9 N. Y., 241.

The right to redemption and subrogation is an equity which will be granted or refused as justice and equity demand: *Bloomington v. Barnard*, 7 Hun, 459; *Dixon on Subrogation*, 52, 93, 78; *Avery v. Pelton*, 7 Johns. Ch., 213-4; *Dauchy v. Bennett*, 7 How. Pr., 376; *Beach v. Shaw*, 57 Ills., 17; *Hodgin v. Guttery*, 58 Ills., 431; *Platt v. Squire*, 5 Cush. (Mass.), 556; *Bispham's Eq. Jur.*, § 338; *Wiley v. Ewing*, 47 Ala., 418; *Miller v. Finn*, 1 Neb., 304.

Equity will only decree subrogation when justice demands it, and where it is necessary in order to protect the interests of the party asking it: *Matter of Hewitt*, 25 N. J. Eq., 210; *Dominion, etc., v. Kittridge*, 23 Grant's (U. C.) Chy., 631; *Bigelow v. Cassidy*, 26 N. J. Eq., 505.

A court of equity gives or withholds its remedies according to the equity of the case made by the complainant. A suitor must not only come to the court with clean hands, but he must come as well with rights in the subject-matter of his bill entitled to protection, and

resting upon equitable grounds: *Beach v. Shaw*, 57 Ills., 24.

The right of subrogation, like that of contribution, is not founded on contract, but on general principles of equity. Being an equitable right, it is consequently subject to the general qualification by which all equities are effected, namely, that it must not be enforced to the detriment of equal or superior equities existing in other parties: *Bispham's Eq.*, § 338.

Subrogation will be denied where it would be inequitable as against others, or may be oppressively used against them. When parties have equal claims to protection, a subrogation will not be decreed: *Dixon on Subrogation*, 116-7; *Newton v. Field*, 16 Ark., 216, 236; *Dominion, etc., v. Kittridge*, 23 Grant's (U. C.) Chy., 631.

The fact that the party asking subrogation may or will be enabled to use the claim oppressively, is a valid reason for refusing a subrogation.

In *Avery v. Pelton* (7 Johns. Chy., 213-4), Chancellor Kent said: No check could be provided against a partial and oppressive use of the judgment in the hands of the plaintiffs in favor of some of the claimants, upon whom the plaintiffs might elect to levy the whole or an undue proportion of the judgment. There might be a succession of suits and assignments, upon the ground on which the assignment is asked for in this case. I must, therefore refrain from interfering at present,

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Bishop v. Ogden, 9 Phila. Rep., 524.

As where the senior creditor has an incumbrance subsequent to that of the creditor seeking to redeem: Dominion, etc., v. Kittridge, 23 Grant's (U.C.) Chy., 631.

The moment it appears that a wrong will be perpetrated against the defendant, the equity of the plaintiff disappears. The court will not place the control of the prior incumbrance in the power of a subsequent incumbrancer, who may at any time proceed to sell the property to the injury of any owner of an intermediate incumbrance.

Plaintiff being holder of a second mortgage that is not the *next* lien is not entitled to an *assignment* of first mortgage upon payment of it in full: Bishop v. Ogden, 9 Phila. Rep., 524.

A surety will not be substituted to the rights and liens of a creditor so as to defeat an interest acquired and held by a third person, where that interest, though subordinate to that of the creditor, is prior in date to the undertaking of the surety: Farmers, etc., v. Sherley, 12 Bush (Ky.), 304.

So where the purchaser under a sale has conveyed his interest to a third person, a resale will not be ordered until notice to such third person and an opportunity for him to be heard on the application: Lawrence v. Jarvis, 36 Mich., 281.

Though the court may set aside a sale as against a *bona fide* grantee from the purchaser: Hale v. Clauson, 60 N. Y., 339.

See 21 Eng. Rep., 557 note.

The party asking subrogation has no right to put the party from whom he demands it to trouble or expense. It will not be decreed to the detriment of equal or superior equities existing in other parties, nor where its enforcement would operate to the prejudice or injury of the creditor: Bispham's Eq., § 333; Id., § 330.

The remedy may be denied for laches: Beach v. Shaw, 57 Ills., 24.

After the holder of a subsequent mortgage has permitted a foreclosure of the prior mortgage to proceed to a judgment, and no costs or an inconsiderable amount will be saved by a redemption, a court of equity will not entertain a suit for redemption if he can as readily protect himself by a

purchase under the decree: Miller v. Finn, 1 Neb., 254, 304.

Where a party holds a second mortgage and his equity of redemption has been cut off by the foreclosure of the first, he may sometimes have the right of subrogation, or even be entitled to an assignment, but it will depend on circumstances showing its equity, and he will not be entitled to a stay of the sale by injunction, without clearly showing that the payment of the first, or its foreclosure or sale, will work him injustice: Bloomingdale v. Barnard, 7 Hun, 459.

Where a party holds a third mortgage, the two prior ones being held by another who has obtained judgment of foreclosure and sale on them, he cannot, as such, claim to be subrogated to the first, nor is he entitled to a stay of the sale by injunction. If he had any ground to equitable relief he should have set it up on the foreclosure. As mere third mortgagee, his rights as such are protected by the opportunity to purchase at the sale or pay up before hand: Bloomingdale v. Barnard, 7 Hun, 459.

A party in possession under an agreement with the mortgagor to pay off such incumbrances as it may be necessary to pay to protect the title, in consideration that he is to receive the profits of the land for a certain time, does not occupy the position of a surety, nor is he entitled to an injunction to stay the sales on the mortgages foreclosed, to which actions both he and the mortgagor were parties: Bloomingdale v. Barnard, 7 Hun, 459.

It may be denied where the plaintiff volunteered to put himself in the position he occupies: Dixon on Subrogation, 163.

The general rule is that a mere volunteer or stranger cannot, by making himself a party to an obligation for the payment of a debt, acquire as against the original debtor a right to be subrogated to the action of the creditor.

In a case decided by the Court of Appeals of Maryland (Swain v. Patterson, 7 Maryland, 164), Rebecca Dorsey mortgaged certain real estate to the Neptune Insurance Company to secure an indebtedness of \$8,000. After a decree for a sale the company conveyed their interest in the mortgage to the

Baltimore Life Insurance Company. Rebecca Dorsey, the mortgagor, conveyed her equity of redemption to Edward H. Dorsey, who thereafter mortgaged his interest in the property to John Patterson to secure a debt.

Afterwards Edward H. Dorsey passed to the Baltimore Life Insurance Company his three promissory notes indorsed by James Swain for \$443.55, being the amount of interest due on the mortgage. These notes were paid by Swain at maturity, and the property having been sold, and the proceeds being more than sufficient to pay the mortgage debt, Swain insisted that to the extent of the notes so paid by him he was entitled to be subrogated to the Baltimore Life Insurance Company, and that his claim should be preferred to that of the subsequent mortgagee. The court were of opinion that the equitable assignment *pro tanto* in favor of a surety cannot be effected unless he has paid the entire debt of the creditor. But the court were also of opinion that as Swain, the surety, never became the surety of the original principal debtor, but only of the assignee of the equity of redemption, the right of substitution claimed could not be maintained, but that the holder of the claim must rank as a simple contract creditor only: Dixon on Subrogation, 141-2.

The doctrine of subrogation in equity is confined to the relation of principal and surety and guarantors, and to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurers paying losses. In the first class named, the doctrine is applied to avoid a multiplicity of suits. In the second class, the person discharging the superior lien is treated as its purchaser or assignee, unless the facts show it was intended as an absolute payment. In the last class, the insurer is subrogated to the remedies of the assured, upon the ground that upon payment he is entitled to the property insured as being abandoned by the assured.

A purchaser of land at an administrator's sale is not entitled in equity to be subrogated to the claims of creditors which have been paid by the purchase-money, where the title fails for a want of jurisdiction in the court ordering the sale over the persons of the heirs.

Where the purchase-money at such

a sale has been applied in removing incumbrances or charges upon the lands of an estate, and the title fails, it has been held that the purchaser may be subrogated to the lien so discharged by his payment; but claims against an estate are not regarded as such a charge upon the real estate. The land may be subjected to their payment upon a deficiency of personal assets, but the administrator takes, in such case, only a power which must be exercised within the period of seven years, unless a satisfactory excuse can be shown for the delay.

A volunteer, or any person, without the consent of the heirs of an estate, cannot, by payment of simple debts against their ancestor, recover the same from the heirs because they have inherited land from the ancestor. Such a person can neither sue the heirs nor charge their lands thus inherited for its repayment, for the reason that, except in the purchase of commercial paper, one person cannot make another his debtor without his consent, either at law or in equity.

It is not accurate to say that lands descending to heirs are charged with the debts of the ancestor.

They are only liable to be charged with their payment upon a deficiency of personal assets, and this right may be lost by delay: Bishop v. O'Conner, 69 Ills., 481.

A junior mortgagee has the right to pay off or redeem a senior mortgage, which is past due, when the owner of the latter is seeking to enforce collection by foreclosure: Frost v. Yonkers Savings Bank, 70 N. Y., 553, reversing 8 Hun, 26.

The doctrine of subrogation applies when a party is compelled to pay the debt of a third person to protect his own rights or to save his own property: Cole v. Malcolm, 66 N. Y., 363.

A junior mortgagee has the right to redeem premises from the lien of a senior mortgage, either by payment or tender of the amount due. There is no distinction between the effect of a tender by a mortgagor and one by a subsequent incumbrancer: Dings v. Parshall, 7 Hun, 522.

Where a junior incumbrancer has paid the debt of the prior incumbrancer he is entitled to be subrogated to the prior liens, and is also entitled to

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all securities held by the prior incumbrancer: *Dings v. Parshall*, 7 Hun, 522.

One P. executed to defendant a mortgage upon certain premises. Defendant agreed by parol to pay two former mortgages on the premises, and, after deducting the amount thereof, paid to P. the balance secured by his mortgage. P. subsequently sold and conveyed the premises to plaintiff, with covenant of warranty, subject to defendant's mortgages. In an action to compel defendant to pay and cancel of record the prior mortgages, or to have the amount thereof indorsed upon his mortgages, held that plaintiff was not entitled to recover; that he could not recover upon the theory that defendant's promise was made for his benefit, as, at the time it was made, he had no relation to or interest in the lands, and the plaintiff's deed did not operate as an assignment to him of P.'s interest in the agreement.

It seems that, upon payment of the prior mortgages, plaintiff would be entitled to be subrogated to the remedy of the mortgages, and could maintain an action against defendant upon the agreement: *Miller v. Winchell*, 70 N. Y., 437.

A. owed a debt to B., who was indebted to C. At the request of B., and in pursuance of an arrangement between B. and C., A. executed a bond and mortgage for the amount of his debt directly to C. The complainant D., on the solicitation of B., but without any request from the mortgagor, guaranteed the payment of the bond. The holder of the bond and mortgage, who had also become the owner of the equity of redemption under the junior mortgage, sued D. upon his guaranty and compelled him to pay the debt. Held, on bill filed by D., that he was entitled by substitution to the benefit of the mortgage for his indemnity: *Matthews v. Aikin*, 1 N. Y., 595; *Ottman v. Moak*, 3 Sandf. Chy., 431.

It is a well settled principle that a surety, who pays a debt for his principal, is entitled to be put in the place of the creditor and to all the means which the creditor possessed to enforce payment against the principal debtor.

If loaned to the firm of L. & Co. the sum of \$1,300, taking as security therefor a mortgage on personal property in

their possession, and also an assignment of the plaintiff's bond and mortgage covering real estate owned by him; which bond and mortgage, at the request of L. & Co. and for their benefit, had been executed to them by the plaintiff, for the purpose of being assigned to H., and which were, at the time the loan was made and as a condition thereof on the part of H., assigned and delivered by L. & Co. to H. as additional security. Subsequently H. brought a suit to foreclose the mortgage on the plaintiff's property, which was prosecuted by his administratrix after his death, to final judgment. To prevent a sale of the mortgaged premises, the plaintiff paid the amount of the judgment, \$1,780.05, taking from the administratrix of H. an assignment of the chattel mortgage. The defendants, after the chattel mortgage had been duly filed, and with notice thereof, converted the property embraced in it to their own use, and refused, on demand, to deliver it to the plaintiff.

Held, 1. That the case was that of a surety compelled to pay the debt of his principal, and who was entitled to be subrogated to the rights of the creditor against the principal debtors.

2. That the right of H. to the property covered by the chattel mortgage was that of owner, as between the parties to the mortgage, and all parties purchasing with notice. That upon a failure to pay according to the conditions of the mortgage, the absolute title at law was in the mortgagee, who had the right to possess himself of the goods, sell the same and pay the debt out of the proceeds.

3. That the plaintiff being subrogated to this right, upon receiving the assignment of the chattel mortgage, was entitled to enforce it for his reimbursement.

4. That the plaintiff, on paying the debt as surety, and on becoming assignee of the mortgage, became invested with the title to the property and all the rights of H. under the mortgage; and that the defendants were liable to him for the amount he had so paid as surety; the value of the property converted exceeding the amount so paid by the plaintiff: *Lewis v. Palmer*, 28 N. Y., 272.

Where a third person, at the instance of a mortgagor, or for his own protec-

tion, pays a note secured by the mortgage, he becomes entitled in equity to the benefit of the mortgage; and, in such case, a court of equity will subrogate him to all the rights of the creditor.

But where the owner of the property mortgaged is no party to the note, and is a stranger to the transaction by which the note was paid, and is a married woman not holding the land in her own separate right, the party so paying the note can have no claim on the property: *Wolff v. Walter*, 56 Mo., 292.

Where a prior mortgagee, having a lien on two funds, one on which there is a mortgage, exhausts the latter for the payment of his debt, the junior mortgagee is entitled to be substituted in his place in respect of the other fund.

This equity was enforced, where the prior mortgagee held a pledge of the rent of the mortgaged premises as further security for his debt, and on foreclosure, his debt was satisfied out of the proceeds of the sale, in favor of a junior mortgagee, against one who, after the sale, received for a precedent debt an assignment of the lease and rent from the mortgagor: *Hunt v. Townsend*, 4 Sandf. Chy., 543.

If a loss under a policy of fire insurance is occasioned by the wrongful act of a third person, the insurer, upon payment, is subrogated to the rights and remedies of the assured, and may maintain an action against the wrongdoer.

If the assured receives the damages from the wrongdoer before payment by the insurer, the amount so received will be applied *pro tanto* in discharge of the policy.

If the insurer, after payment of the damages by the wrongdoer to the assured, voluntarily pays the policy, he cannot maintain an action against the wrongdoer.

If the wrongdoer pays the assured after payment by the insurer, with knowledge of that fact, it is a fraud upon the latter, and will not protect the wrongdoer from liability to him: *Conn. Fire Ins. Co. v. Erie Railway Co.*, 73 N. Y., 399.

The mortgagee of a vessel, who had never been in possession, recovered in an action against marine underwriters,

upon a policy insuring his interest, judgment for a total loss by the barratry of the master appointed by the mortgagor, and afterwards recovered judgment in an action of tort for the conversion of the vessel by the same act of barratry. Both judgments were satisfied. Held, that the underwriters were entitled to be subrogated to the rights of the mortgagee in the damages recovered by him for the injury to his interest in the property, and that this right was not affected by their refusal, while the action of tort was pending, to accept an offer by the mortgagee to transfer the control of that action to them upon the condition that they should pay the expenses already incurred therein, and without prejudice to rights of the mortgagor in the judgment to be recovered: *Mercantile Marine Ins. Co. v. Clark*, 118 Mass., 288.

Where by the terms of a mortgage the mortgagee, in case of failure on the part of the mortgagor to keep the buildings upon the mortgaged premises insured, is authorized to make such insurance, and it is declared that the premiums shall be deemed secured by the mortgage, the provision does not prohibit or prevent an insurance by the mortgagee directly of his interest; and he may make such terms with the insurer as they may agree upon.

Where, therefore, the holder of such a mortgage takes out a policy of insurance upon his interest as mortgagee, with a provision in the policy that, in case of loss, the assured shall assign to the insurer an interest in the mortgage equal to the amount of loss paid, the insurer is entitled to be subrogated or provided for; the contract of insurance is paramount to and independent of the contract between the mortgagor and mortgagee, and the rights of the insurer cannot be affected thereby. The consent of the mortgagor is not essential to the validity of such a provision for subrogation.

Accordingly, held, where such a policy had been issued by defendant, and when a loss having occurred it paid to the holder of the mortgage the amount thereof, together with the premiums paid, and took an assignment of the mortgage, that in an action to foreclose the mortgage the mortgagor or his grantee could not claim an applica-

tion of the amount of the insurance as payment upon the mortgage.

Also, held, that knowledge on the part of defendants at the time of issuing the policy of the terms of the mortgage did not affect its contract.

Also, held, that the fact that the policy did not provide expressly for the assignment of the bond secured by the mortgage, but only specified the latter, did not establish that the assignment of the former also could not have been compelled by the insurance company, and so that the payment to the mortgagee was no liquidation of the bond; the evident intent was to include both bond and mortgage in the transfer.

The fact that by the declarations of the mortgagee in such case the mortgagor was prevented from insuring on his own behalf, cannot affect the rights of the insurer; if the mortgagee was in a position where he could not lawfully enter into the contract which he made with the insurer, the latter was not bound, and being under no obligation to pay a loss, by the assignment it became the owner of the entire interest in the mortgage: *Foster v. Van Reed*, 70 N. Y., 18, reversing 5 Hun, 321.

Where real estate, incumbered by a mortgage prior in lien to that of a mere personal judgment against the owner thereof, is first sold by the sheriff upon an execution issued on such judgment, and afterwards upon a decree of foreclosure of such mortgage, rendered in a proceeding therefor, whereof the purchaser had no notice, and without redeeming from him, he or his grantee may, either in an original action by him to redeem against the latter purchaser, or by a counter-claim in an action by the latter against him to quiet title, have an accounting of the amount actually due to such latter purchaser, and obtain a decree allowing him to redeem by paying such amount so to be found due.

To redeem in such action it is not necessary that, prior to the commencement thereof, such junior claimant shall have tendered the amount due to the holder of the prior claim, nor need he bring such amount into court; it being sufficient to offer, in his pleading, to pay whatever amount shall be found due.

Query. In such proceeding, is the

amount due to the holder of such prior lien determined by the amount for which his decree was rendered? *Combs v. Carr*, 55 Indiana, 308.

Conventional subrogation can only result from an express agreement either with the debtor or creditor. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor.

The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor be wholly satisfied, there ought and can be no interference with his rights or securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim: *Receiver of New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq., 658.

Where the owner of property mortgaged it to W. and then assigned an undivided half to J. subject to the mortgage, and at a later date executed a mortgage on his remaining undivided half to B., who afterwards obtained an assignment of the first mortgage:

Held, that the representatives of J. were not bound to redeem both mortgages, but only the mortgage to W.: *Buckler v. Bowman*, 12 Grant's Chy., 457.

A judgment creditor seeking and entitled to redeem a mortgage incumbrance is entitled, upon payment of the amount due to the mortgagee, to the benefit of all collateral securities—as a policy of insurance—whether the same be subject to the lien of the creditor under the judgment or not: *Gilmour v. Cameron*, 6 Grant's (U. C.) Chy., 290; *Higgins v. Wright*, 43 Barb., 461.

But they must be such as continue to exist, and do not by payment become extinguished as to the principal debtor: *Bigelow v. Cassidy*, 26 N. J. Eq., 505.

The second National Bank of C. held notes of defendant C. indorsed by a firm composed of the defendants W. F. L. and R. L., and, as collateral, two mortgages of C. The bank also held a note of C. indorsed by plaintiff. C., upon the release and cancellation of the two mortgages, executed and delivered to the bank two other mortgages for the same amounts upon the same

property, as collateral security for all his indebtedness, including that for which plaintiff was surety. W. F. L. purchased of the bank all its claims against C., took an assignment of the two mortgages and thereafter brought suit against plaintiff upon his indorsement, and collected the amount of the note so indorsed from plaintiff.

In an action by plaintiff to be subrogated to a proportionate share of the securities, held that he had a right to subrogation; that, so far as he was concerned, the bank was bound to preserve the security unimpaired, so that he could have the benefit of it for his own indemnity, upon payment of the note; that, although the bank, by releasing the former securities, may have incurred a liability to the L.'s, or may have released them from liability, this gave them no superior equities under the new arrangement, and did not affect the rights of plaintiff; and that W. F. L., after he purchased from the bank the obligations of C., and received a transfer of the securities, occupied the same position as did the bank, and acquired no additional rights.

The mortgages given were for a less amount than the principal debt; they were each for a specified sum, payable at a stated time with interest; the debts secured thereby were not specified. Held, that it was fairly inferable that the parties intended the interest should accumulate to cover the deficiency, and that payment of interest from time to time, as the notes were renewed, did not extinguish the interest on the collaterals.

And it appearing that defendant L. foreclosed one of the mortgages, claiming only a portion of the interest, it also appearing affirmatively that he might have realized the full amount, held that he should account to the plaintiff for that amount: *Cory v. Leonard*, 56 N. Y., 494.

Where an order to mark a judgment "secured on appeal," was obtained on the application of a law firm, of which one of the sureties on the undertaking on appeal was a member, upon notice to the plaintiff in the judgment, but without notice to the other surety on the undertaking; held, that the order was valid as to the plaintiff in the judgment and the surety whose law firm made the motion, but was invalid

as to the surety who had not been notified of the application.

The several members of a law firm constitute but one person in the law. The act of one, in the course of the partnership business, is the act of all.

Upon the payment of the judgment by one of the sureties, on appeal, he is entitled to be subrogated to the rights of the creditor existing at the time he signed the undertaking, and may enforce the judgment against all property on which it was then a lien, unless the lien had been lost through some act or omission of the creditor.

The rule is, however, that the surety can enforce the judgment against lands of the judgment debtor conveyed away by him in the inverse order of alienation only.

Where a person advances money to take up a mortgage, and the same is paid upon the understanding and belief on his part that the mortgage is the only lien upon the land, the party so paying is entitled to be subrogated to the rights of the mortgagee as against a judgment recorded subsequent to the mortgage marked "secured on appeal," although the same was so marked without notice to a surety on appeal, who afterwards paid the judgment: *Green v. Milbank*, 3 Abb. N. C., 138.

Where a mortgage upon lands, executed by a husband and wife, was created to raise funds to pay off a prior mortgage upon the same premises, executed by the mortgagor before his marriage and the funds were used for such purpose, it afterwards appearing that the wife, at the time she executed the last mortgage, was an infant, but the fact of such infancy was not disclosed:

Held, in an action to foreclose the last mortgage, that the person taking the same was entitled to be subrogated to the rights of the mortgagor under the first mortgage, and that the same should be revived and enforced to the amount advanced to pay the same, to the exclusion of the dower rights of the wife, and that such dower rights would attach only to any surplus remaining after the mortgage debt was paid: *Snelling v. McIntyre*, 6 Abb. N. C., 469, distinguishing *Banta v. Garmo*, 1 Sandf. Chy., 383, and applying *Barnes v. Mott*, 64 N. Y., 397, and *Green v. Milbank*, 3 Abb. N. C., 138.

Defendants indorsed a promissory note for the accommodation of E. B., the maker, and L. E. B., the first indorser, which note was discounted by plaintiff. The B.'s had obtained various other loans from plaintiff, and previous to opening an account had deposited, as collateral, certain securities belonging to the wife of E. B. Subsequent to the discount of said note plaintiff purchased a past due note of the B.'s. The notes not being paid, the collaterals were sold and converted into money. In an action upon defendant's indorsement, the court below decided that the proceeds of the collaterals should be applied *pro rata* upon the notes. Held error; that the presumption was, in the absence of proof that the collaterals were deposited to secure loans and discounts made to the B.'s, not all claims which plaintiff might acquire, and that defendants were entitled to have a priority in the application of the avails.

Also held (Dwight, C.), that defendants, as sureties, were entitled to subrogation to the claim of plaintiff, and acquired an equitable lien upon the collaterals, which right accrued as soon as their liability attached, and could not be affected by the creditors, and that in the absence of proof of a different arrangement the presumption was, they were entitled to a priority over sureties upon other and later claims, or over the creditor upon subsequent loans: *National Exchange, etc., v. Siliman*, 65 N. Y., 475, distinguishing *Farebrother v. Wodehouse*, 23 Beav., 18.

A valid and subsisting obligation is not destroyed because included in a security, or made the subject of a contract void for usury; although formally satisfied and discharged, it may be revived and enforced in case the new security or contract is invalidated.

Plaintiff and H., being the owners of a mortgage upon defendant's premises, and having obtained judgment of foreclosure and sale thereon, agreed with defendants to bid in the premises, advance money to pay off a prior mortgage, and to convey to defendant R. E. B., defendants to execute a new bond and mortgage to them; the agreement was carried out. H. assigned his interest in the new bond and mortgage to plaintiff. Subsequently these were adjudged void for usury. In an action

brought by plaintiff to be subrogated to the rights of the prior mortgagee, and to foreclose the prior mortgage; held, that plaintiff and H., as junior incumbrancers, had, at the time of the usurious agreement, the right to pay the prior mortgage and to be subrogated; that this right was not destroyed by reason of entering into said agreement, but they were equitably entitled to the same benefits of the redemption as if made without such agreement, and by paying the debt they became entitled to a cession of the debt and a subrogation to all the rights of the mortgagee, and that the mortgage was to be regarded as against the mortgagors as still existing and uncanceled: *Patterson v. Birdsall*, 64 N. Y., 294, affirming 6 Hun, 632.

To a suit by a second incumbrancer, to redeem the prior incumbrances, the owners of the equity of redemption are necessary parties. The owner of property mortgaged it, and then died, having devised one-half the property to one son and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:

Held that the one annuity not being in arrear, and the assignee of the mortgage being willing to pay the arrears of the other annuity, the testator's widow could not insist on redeeming the mortgage: *Long v. Long*, 16 Grant's (U. C.) Chy., 239, affirmed 17 id., 251.

The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage.

But this rule does not necessarily exclude the right of obtaining, in the same suit against other parties, relief consequent on such redemption.

Where a mortgagor had assigned the mortgage property, and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and mortgagor was held not to be improper.

But where such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed: *Rogers v. Lewis*, 12 Grant's Chancery, 237.

Where a surety pays a debt and claims an assignment of a judgment which the creditor had recovered against the debtor, and it is doubtful whether the payment is a satisfaction of the judgment, the creditor may properly make the assignment and leave the debtor to set up that defence if proceedings are taken on the judgment.

To a suit by a surety against the creditor for an assignment recovered against the debtor, the debtor is a necessary party: *Cockburn v. Gillespie*, 11 Grant's Chy., 465.

To entitle a creditor to subrogation in equity to the rights of a surety under a mortgage given by the debtor, it is not necessary that he should have exhausted his legal remedies, or should have reduced his debt to judgment.

Where a mortgage has been given by a debtor to indemnify his surety against two debts, due to different persons, one of the creditors cannot have a decree subjecting the mortgaged property to sale for the satisfaction of his debt, on a decree *pro confesso* against the other creditor as a non-resident, without averring that his debt had been paid or released, or that he had waived or refused the benefit of the common security: *Saffold v. Wade*, 51 Ala., 215; *Bithik v. Wilkins*, 7 Heiskell, (Tenn.), 307.

The party desiring subrogation has no right to demand an assignment. He cannot maintain an action to compel one on that ground though a subsequent purchaser. Only *sureties* are entitled to an assignment: *Ellsworth v. Lockwood*, 42 N. Y., 89, 93, 96-9.

Where a party is so related to a mortgage that he is not personally liable upon it, but is obliged to pay it to save his estate, and he does pay it, the payment will be presumed to be made for that purpose, and in such case no assignment of the mortgage to the person paying it, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it: *Walker v. King*, 44 Vt., 602, 609-612.

The holder of the prior incumbrance has no right to insist upon cancelling or discharging it. The creditor redeeming, though not entitled to demand an assignment, has a right to in-

sist it shall not be discharged: *Bank v. Moore*, 8 Grant's (U.C.) Chy., 461.

See also *Bigelow v. Cassidy*, 26 N. J. Eq., 505.

A tender by the junior mortgagee, to have the effect of payment of the prior mortgage, must be made in unmistakable terms, so that there could be no doubt of the intent to satisfy and discharge the senior mortgage, not to redeem and have a transfer of it: *Frost v. Yonkers Sav. Bank*, 70 N. Y., 553, reversing 8 Hun, 26.

The payment by the junior to the senior creditor of the amount of the latter's security, vests the title to such security as matter of equity in the redeeming creditor: *McLean v. Towle*, 3 Sandf. Chy., 128; *Bigelow v. Cassidy*, 26 N. J. Eq., 557; approved on this point, 27 id., 505; *McArthur v. Martin*, 23 Minn., 74; *Mattison v. Marks*, 81 Mich., 421.

See *Hudson v. Smith*, 39 N. Y. Superior Court Rep., 458.

On the other hand, if the owner of the prior incumbrance assign the same by a written assignment, if the title thereto fail, or the incumbrance assigned be for any reason held invalid, he, as assignee, would be *ipso facto* liable for the purchase-money, and bound to repay it: *Fake v. Smith*, 7 Abb. Prac., N.S., 108; *S. C.*, 2 Abbott's Court Appeals Dec., 76; *Delaware Bank v. Jarvis*, 20 N. Y., 226; *Sherman v. Johnson*, 56 Barb., 59; *Webb v. Odell*, 49 N. Y., 583.

In Upper Canada, it seems to be held, the creditor redeeming has a right to demand an assignment: *Bank v. Moore*, 8 Grant's (U. C.) Chy., 461; *Gilmour v. Cameron*, 6 Grant's Chy., 290.

The case of *Millard v. Cheesebrough*, 1 Johns. Chy., 409, is not in conflict with the position that even in a case where a junior is entitled to redeem a prior incumbrance, he is not entitled to an assignment. That case arose between sureties, and is within the exception so distinctly pointed out in *Ellsworth v. Lockwood*, 42 N. Y., 80.

The distinction between the owner accepting the amount due on his security, and allowing the title thereto to pass to the subsequent incumbrancer as matter of equity, and giving an assignment by which it passes under contract, is obvious.

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One who purchases at a *sale* under a mortgage or execution, purchases the rights under the mortgage and nothing else; and though he obtain no title, he is bound to pay his bid, and has no remedy against the mortgagee or the plaintiff in the execution to recover back the amount paid on his bid: 11 Am. Dec., 699, and cases cited; 26 Am. Rep., 38, and cases cited.

Canada, Upper: Matter of Carfrae, Taylor (K. B.), 472; Densmore v. Shackleton, 26 U. C. Com. Pl., 604; Austin v. County Simcoe, 22 U. C. Q. B., 73.

Illinois: Bishop v. O'Conner, 69 Ills., 431; Vanscoyoe v. Kimler, 77 Ills., 151; Holmes v. Shaver, 78 Ills., 578; Roberts v. Hughes, 81 Ills., 180.

Indiana: Neal v. Gillaspay, 56 Ind., 451, 26 Am. Rep., 37; Seman v. Harvey, 52 Ind., 831.

Iowa: Findlay v. Richardson, 46 Iowa, 108.

Ireland: Murphy v. Sands, Irish Rep., 10 C. L., 809.

Michigan: Rice v. Auditor, 30 Mich., 12.

Missouri: Stephens v. Ells, 65 Mo., 456.

New York: Fryer v. Rockefeller, 4 Hun, 800, affirmed 63 N. Y., 268.

Pennsylvania: Fiedly v. Schutz, 9 Serg. & R., 156, 11 Am. Dec., 691.

Rhode Island: Corcoran v. Allen, 11 R. I., 567.

Texas: Ward v. Williams, 45 Tex., 617, disapproving *dicta* in Walton v. Regan, 20 Tex., 103.

Unless the party, by representing he has title, induces the purchaser to bid: Lansing v. Quackenbush, 5 Cowen, 48; Dwight's Case, 15 Abb. Prac. Rep., 259; Atwood v. Chapman, 68 Maine, 38.

Though the misrepresentation must be as to a *fact* not known to the purchaser. If honestly made as to ownership, and the defect appears on an abstract the purchaser has, it is not a fraudulent misrepresentation: Botsford v. Wilson, 75 Ills., 132.

See also Fryer v. Rockefeller, 63 N. Y., 268.

The misrepresentation must, however, be by the *party*, and not by the sheriff: Vanscoyoe v. Kimler, 77 Ills., 151; Bishop v. O'Conner, 69 Ills., 431.

But see 23 Am. Rep., 527 note.

The purchaser of real estate at guardian sale has no right to infer, from

the guardian's assurance that he will give a good title, that he is acquiring a title in fee simple, and, such assurance being given in good faith and without fraudulent intent, the purchaser is not entitled to equitable relief even though he may have been misled thereby.

The purchaser having acquired all the interest of the ward in the land, he cannot refuse to pay a promissory note given for the purchase-money on the ground of a failure of consideration: Findlay v. Richardson, 46 Iowa, 108; Tucker v. White, 125 Mass., 344.

So an administrator: Ward v. Williams, 45 Tex., 617.

And it has been held that a sheriff is not himself liable for stating the title is good unless he did so fraudulently: Tucker v. White, 125 Mass., 344.

The doctrine of *caveat emptor* applies to every purchaser of real estate sold by a sheriff on execution; he acquires no better title than the judgment creditor would, had he purchased: Frost v. Yonkers Sav. Bank, 70 N. Y., 553, reversing 8 Hun, 26.

Where, therefore, by a valid agreement between the judgment creditor and debtor, the lien of the judgment upon the real estate has been postponed and made subordinate to that of a junior mortgage, the purchaser, although he bought in ignorance of the agreement, takes the land subject to the lien of the mortgage: Frost v. Yonkers Sav. Bank, 70 N. Y., 553, reversing 8 Hun, 26.

Defendant was the owner of a mortgage upon premises upon which a judgment prior to the mortgage was a lien. The owner of a fourth mortgage upon the premises, for the purpose of inducing plaintiff to purchase, procured from the owner of the judgment a written instrument by which he agreed to postpone the lien of his judgment, and make it subordinate to that of the mortgage, and plaintiff thereafter purchased and took an assignment of said mortgage. The premises were sold upon execution issued on the judgment, and defendant purchased without notice or knowledge of said agreement. Defendant thereafter commenced a foreclosure of his mortgage, and judgment of foreclosure and sale was rendered, and the premises were advertised for sale thereunder.

Plaintiff thereupon tendered to de-

fendant the amount found due by the foreclosure judgment, with interest and costs, and demanded a transfer of the mortgage and judgment.

Held, that the tender did not amount to a payment and satisfaction of the mortgage and judgment, but that plaintiff had the right to redeem, and the tender was sufficient without a tender of the amount of the judgment to entitle him to a transfer of the securities; that plaintiff, as assignee of the mortgage, was entitled to the benefit of the agreement postponing the lien of the judgment, as it made the mortgage the senior security; and that its character as such was not affected by the sale under the judgment: *Frost v. Yonkers Sav. Bank*, 70 N. Y., 553, reversing 8 Hun, 26.

To the argument that unless the incumbrance sought to be obtained by the second incumbrancer were valid, the owner ought not to accept the money of the second, and if therefore he do, he ought to be liable to repay it, the answer is, that while this would be so, if he sold and assigned it as a valid security, yet if it were of doubtful validity, he would have a right to sell it, or all rights thereunder, for the highest price he could obtain. The purchaser might pay its face. It might turn out to be worthless, but the maxim *caveat emptor* would protect the seller. Neither the second incumbrancer nor the court has a right to compel the owner to assume the position of an assignor, in the ordinary sense of the term, and to bind himself by the implied warranty of a written assignment which cannot be varied by oral evidence.

A party to a written contract cannot vary its legal effect by parol evidence, though it contain no express provision on the subject. Parol evidence is no more admissible to contradict what is implied from a written contract, than to contradict its express provisions: *Norton v. Coons*, 6 N. Y., 33; *Graves v. Porter*, 11 Barb., 592; *Bank, etc., v. Smith*, 27 Barb., 489; *Pattison v. Hull*, 9 Cow., 747; *Dale v. Gear*, 38 Conn., 15.

So in some cases where the judgment creditor purchases, and the defendant in the execution had no title, but the execution was returned satisfied, it has been held he was entitled to have the satisfaction cancelled and to issue a new execution, no rights of

any third person having intervened: *First, etc., v. Rogers*, 22 Minn., 224; *Wombaugh v. Gates*, 11 Paige, 506.

So where the purchaser discovers a defect in title, not known to him at his purchase, before paying the purchase-money, it has been held he would not be compelled to complete his purchase: *Merchants Bank v. Thompson*, 55 N. Y., 11; *Ormsby v. Terry*, 6 Bush, 553; *McGown v. Wilkins*, 1 Paige, 120; *Spring v. Sanford*, 7 Paige, 550; *Jackson v. Edwards*, 22 Wend., 498; *Seaman v. Hicks*, 8 Paige, 655.

And might recover back his deposit: *Kearny v. Ryan*, 2 Irish Law Rep., 61, reversing Irish Rep., 10 C. L., 500.

Otherwise where the purchase is made with a knowledge of the defect: *Fryer v. Rockefeller*, 63 N. Y., 268.

But when the money is paid it cannot be recovered back: *Neal v. Gillaspy*, 56 Ind., 451.

But see *McGovern v. Avery*, 37 Mich., 120.

And so where the proceedings are so void they do not transfer whatever title the defendant had, the purchaser is exonerated from paying the amount of his bid: 11 Am. Dec., 699 note.

Alabama: *Riddle v. Hill*, 51 Ala., 224.

California: *Boggs v. Hargrave*, 16 Cal., 559.

Kentucky: *Todd v. Dowd*, 1 Met., 281; *Barret v. Churchill*, 18 B. Mon., 387.

Michigan: But see *Adams v. Hubbard*, 30 Mich., 105.

Mississippi: *Laughman v. Thompson*, 14 Miss., 259; *Campbell v. Brown*, 7 Miss., 230.

Missouri: *Good v. Crow*, 51 Mo., 214.

New York: *Cook v. Farnam*, 21 How. Pr., 266, 34 Barb., 95, 12 Abb. Pr., 359.

Pennsylvania: *Commissioners v. Smith*, 10 Watts, 392.

Tennessee: *Bartes v. Tompkins*, 4 Sneed, 623.

A purchaser upon a sale under a void execution, who has paid the purchase-money in good faith, without actual knowledge of the invalidity of the process, to the party who procured the sale, the latter knowing that the sale gave no title, can maintain an action against such party to recover back the money paid. Knowledge will not

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be imputed to the purchaser in such case in order to make out that the payment was voluntary. *Schwinger v. Hickok*, 53 N. Y., 281.

Where the sheriff by mistake sold the wrong numbers, so that no title passed to the lots intended to be sold, it was held the purchaser was entitled to relief by way of an order for a sale of the proper lots and those he supposed he was purchasing and which the sheriff intended to sell: *Fraser v. Ingham*, 4 Neb., 531.

In *New York* the statute has provided for cases where the purchaser, on a sale under execution, is evicted. But no provision has been made for the purchaser of, or under, a mortgage: 2 R. S., 375, §§ 68, 69, 2 Edm. St., 389.

In *Kentucky* it has been held that there is no implied warranty of title by the sheriff on a sale of property by him under execution.

Where the sheriff acts in good faith, having no sufficient reason to doubt the title, he cannot be held responsible, and the doctrine of *caveat emptor* applies.

But where the sheriff is informed of the existence of an adverse claim, or is in possession of facts which should place one of ordinary prudence on inquiry in regard to the title, it is his duty to take a bond of indemnity to protect the purchaser as well as the claimant from any defect of title; or, as to the purchaser, he should make known the defects or the existence of the adverse claim, if any exists, when he offers the property for sale: *Harrison v. Shanks*, 13 Bush (Ky.), 620.

The presumption is, that one agreeing to purchase a municipal corporation tax lease, is to take it at his own risk as to title, and that the vendor is to warrant nothing more than its genuineness and his ownership thereof: *Boyd v. Schlesinger*, 59 N. Y., 301.

It has been held in Michigan that where executors sold the certificate of an execution sale that had been issued to their testator, which turned out to be void, the purchaser might recover back his money: *McGovern v. Avery*, 37 Mich., 120.

The city of Chicago had procured judgment and an order for the sale of a lot for the non-payment of a special assessment thereon for the extension of

an avenue, and at the sale the plaintiff became the purchaser and received a certificate of purchase, but before he received a deed the owner of the lot, on bill in chancery against the plaintiff, the city and its officers, obtained a decree enjoining the projected improvement, declaring the sale to be void, and ordering the surrender of the certificate of purchase and its cancellation; held, that the plaintiff was entitled to recover from the city the sum paid by him for the lot: *Wells v. City of Chicago*, 66 Ills., 280.

C., being indebted to plaintiff, conveyed certain lands through a third person, without consideration, to his wife, who died intestate. Plaintiff thereafter recovered judgment against C., and, after return of execution thereon unsatisfied, commenced an action against C. and the heirs of his wife to set aside the conveyance as fraudulent against creditors, and obtained a judgment setting it aside as to plaintiff, declaring his judgment a valid lien thereon, and appointing a receiver to sell, etc. The receiver advertised the land for sale. Defendant M., one of the heirs, and who had succeeded by purchase to the rights of nearly all the others, tendered the amount due on plaintiff's judgment, and demanded an assignment thereof, which was refused. M. thereupon made a motion to compel an assignment upon payment, and that he be subrogated to the rights of the owner of the judgments, which was denied. Held error; that the title of the heirs was good as against C., and upon payments of the judgments, which were his debts; to save their lands, they were entitled to subrogation as against him.

Held, also, that the point that it was discretionary with the Supreme Court whether to entertain the motion or to turn M. over to an action, not having been taken by respondent, and the motion having been disposed of below upon the merits, and not upon the ground that an action should have been commenced, the point would not be considered here: *Cole v. Malcolm*, 66 N. Y., 363.

If the party seeking protection can by motion for a resale, or that the premises affected be sold in a particular order, in a suit pending on the incumbrance sought to be redeemed, the

court will ordinarily require him to do so, and will not allow him to subject the owner of the prior incumbrance to a separate and an independent suit: *McCotter v. Jay*, 30 N. Y., 80; *Gould v. Mortimer*, 26 How. Pr., 167; *Dederick v. Hoysradt*, 4 How. Pr., 350; *Smith v. Am. Life Ins. Co.*, *Clarke's Chy.*, 307; *Lane v. Clarke*, *Clarke's Chy.*, 309; *Hunt v. Farmers*, etc., 8 How. Pr., 416, 419; *Tarrant v. Quackenboss*, 10 How. Pr., 244; *Brown v. Tallmadge*, 16 How. Pr., 324; *Bennett v. Le Roy*, 14 How. Pr., 178; *Harmon v. Russell*, 23 How. Pr., 174; *Whitfield v. Bacon*, 24 Barb., 155; *Minor v. Webb*, 10 Abb. Pr., 286; *Ely v. Lowenstien*, 9 Abb. Pr. (N.S.), 39; *Dyckman v. Kernochan*, 2 Paige, 26.

One exception to this rule is where an action is brought to restrain a number of actions to protect a threatened multiplicity of suits: *Ely v. Lowenstien*, 9 Abb. Pr. (N.S.), 39.

An action may be brought to set aside a sale made under a decree of foreclosure, where the sale has been fraudulently conducted to the prejudice of a party interested in the property, even though such party may have a concurrent remedy by motion. But where the proceedings are entirely regular and free from fraud, and the party is entitled to relief on some mere equity, his remedy is by motion in the action in which the proceedings were had and not by action.

A party to an action brought to foreclose a mortgage, who desires to have the mortgaged premises sold in a particular order, should have a clause to that effect inserted in the decree; or, after the entry thereof, he should move for an order directing the referee as to the order in which the premises are to be sold; or he may, after the sale, move to set the same aside, in case the referee shall have disregarded any proper request made to him at the time thereof.

To enable a subsequent mortgagee to compel the assignment to himself of a prior mortgage, there must be some equitable reason for it, and the mere fact that he is a subsequent mortgagee does not constitute such equitable reason: *Vandercook v. Cohoes Savings Inst.*, 5 Hun, 641.

As the opinion in this case is not reported in full, we give it:

PER CURIAM: Undoubtedly an action may be maintained to set aside a sale, whether made under execution or under a decree in foreclosure, where the sale has been fraudulently conducted to the prejudice of a party interested in the property sold, and this too, even although the party may also have a concurrent remedy by application to the court on motion. In many cases where fraud and collusion constitute the grounds of relief, proceeding by action affords the only certain and effectual remedy. But, it was held in *McCotter v. Jay* (30 N. Y., 80), that where foreclosure proceedings are entirely regular and free from fraud, and the party was entitled to relief on some mere equity, the remedy was by motion in the action in which the proceeding was had. In the case at bar there was no fraud, in so far as we are advised by the papers before us, nor was there any irregularity in the sale. Therefore if we leave out of view plaintiff's demand for an assignment of the prior mortgage, which subject will be hereafter considered, the proper mode of obtaining the desired relief in this case was by the summary, speedy and little expensive proceeding by motion. It was held in *Gould v. Mortimer* (26 How., 167), that an action cannot be brought to set aside a sale under a decree in foreclosure when relief may be obtained by summary application to the court in the foreclosure suit. (See cases cited in the above case, also *Smith v. The American Life Ins. and Trust Co.*, *Clarke's Chy. Cases*, 307.) It appears that the plaintiff obtained his rights by assignment from a party defendant in the foreclosure suit shortly prior to the sale. His position is therefore in all respects that of his assignor as regards all matters connected with that suit. Now, one complaint against the sale is as to the order in which the mortgaged premises were sold, but the plaintiff's assignor could have secured all rights to which he was entitled as regards the order of sale in that action. He appeared and answered, but withdrew his answer and permitted a decree to be entered, which decree did to some extent regulate the order of sale. If necessary to protect his rights he could have had a clause inserted therein having that end in view, and he could also, by motion

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after the decree was entered, have obtained an order directing the referee as to the order of sale. So too, the plaintiff, his assignee, could have moved the court in that action before the sale, if necessary for directions to the referee, or even after the sale he could, on motion, have set the sale aside, in case his proper request at the sale had been disregarded.

These considerations afford a complete answer, supported as they are by the above authorities, to the plaintiff's claim for an injunction, on the ground that the referee disregarded his request as to the order in which the lots comprising the mortgaged premises should be sold.

Nor is a case made by the plaintiff for an injunction on the ground of a tender and demand of an assignment of the prior mortgage and decree. (*Ellsworth v. Lockwood*, 42 N. Y., 89.) In this case *Ellsworth* had the position of subsequent mortgagee; and it was decided that, inasmuch as he was not

also surety for the debt, he could not compel an assignment of the prior mortgage. Judge Earl, who dissented from the conclusion in the prevailing opinion, in the case, concurred in this branch of it with perhaps some qualifications in case of especial equities. But he says that in every case, to enable the owner of the land to compel an assignment thereon, there must be some equitable reason for it, some such reason must exist before a subsequent mortgagee can compel the assignment to himself of a prior mortgage; and the *mere fact* that he is such subsequent mortgagee does not constitute such "equitable reason." In this case the plaintiff shows no superior right to control the sale of the mortgaged premises, no right whatever beyond having it justly and fairly conducted, and this he could have secured by motion in the foreclosure suit.

The order appealed from must be reversed, and the motion to dissolve the injunction granted.

[6 Chancery Division, 618.]

V.C.M., July 22, 31, 1877.

In re MICHELL'S TRUSTS.

Settlement—After-acquired Property—Covenant—Change in State of a Fund—Contingent Interest falling into Possession—Words pointing to Futurity.

By an ante-nuptial marriage settlement the intending husband covenanted that in case at any time during the joint lives of the husband and wife any future portion or real or personal estate whatsoever exceeding a specified sum should come to or devolve upon the wife, or the husband in her right, by or under the will of a person named, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the husband and all other necessary parties would from time to time effectually settle or concur with the wife in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, in manner therein mentioned:

Held, that a fund to which at the date of the settlement the wife was entitled contingently on the happening of two events which happened during the coverture was bound by the covenant.

THIS was a petition for payment out of court of a fund paid in under the Trustee Relief Act.

William Michell, by his will, dated the 25th of March, 1825, after specifically devising certain real estate, devised and bequeathed all the residue of his estate and effects to trustees upon trusts for sale and conversion and investment, and for payment of the income to his wife, Sally Michell,

during her life, and after her decease, as to one equal third part, upon trust for and to pay, assign, and transfer the same to his brother, John Henry Michell, *in case he [619 should be living at the decease of the testator's wife, but if his brother should have died in the lifetime of the testator's wife, he directed that his trustees should stand possessed of the same one-third share in trust for all and every the children of John Henry Michell living at the time of the decease of his wife, to be equally divided between them share and share alike, and if there should be but one such child, then in trust for such only child, the shares in or the whole of the third share (as the case might be) to be paid, assigned, and transferred to such of the said children, or such only child, in manner therein mentioned.

William Michell died on the 22d of May, 1840.

John Henry Michell had an only child, Margaret Henrietta. By a settlement made upon her marriage with Francis John Swaine Hepburn, which was dated the 2d of July, 1842, certain funds to which she was then entitled expectant upon the death of John Henry Michell and Margaret his wife were settled upon trusts for her for life, and then for the husband for life, and after the decease of the survivor of them, upon trusts for the children of the marriage, and in default of children, upon trust as to one moiety for the persons who would have been entitled under the Statutes of Distribution if Mrs. Hepburn had died unmarried, and as to the other moiety, upon such trusts as Mrs. Hepburn should by will appoint, and in default of appointment upon the trusts of the settlement. And the settlement contained a covenant by the husband "that in case at any time during the joint lives of the said Francis John Swaine Hepburn and Margaret Henrietta Hepburn any future portion or real or personal estate whatsoever exceeding at one time in value £300 shall come to or devolve upon the said Margaret Henrietta Hepburn, or upon the said Francis John Swaine Hepburn in her right, by or under the will of the said John Henry Michell, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the said Francis John Swaine Hepburn and all other necessary parties will from time to time effectually settle or concur with the said Margaret Henrietta Hepburn in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, upon the same trusts and with and *subject to the [620 same powers and provisions as are hereinbefore declared and

contained concerning the said trust moneys and securities hereby settled, or as near thereto as by the deaths of parties and other contingencies shall be then subsisting and capable of taking effect, and as if the same future property were included and settled in and by this indenture and being real estate were directed to be converted into personal estate."

Mrs. Hepburn, by her will, dated the 10th of April, 1843, in express exercise of the power of appointment contained in the will, appointed that in case she died in the lifetime of her husband and left no child by him who under the trusts of the settlement should become entitled to the trust moneys and securities comprised therein, then after the decease of the survivor of her father and mother and after her own decease the trustees of the settlement should stand possessed of one moiety or equal half part of and in the trust moneys and securities comprised in the settlement and the annual produce thereof, and one moiety or equal half part of and in all such future portion or real or personal estate as should or might be assigned to the trustees of the settlement under or by virtue of the covenant of her husband, in trust for her husband, his heirs, executors, administrators, or assigns, for his own use.

John Henry Michell died on the 10th of March, 1844, leaving Mrs. Hepburn, his only daughter, surviving him.

Margaret Michell, Mrs. Hepburn's mother, died on the 21st of September, 1849, and Sally Michell, the widow of William Michell, died on the 15th of July, 1858.

Mrs. Hepburn died without issue on the 29th of May, 1859, and administration with her will annexed was shortly afterwards granted to her husband.

Mr. Hepburn died on the 28th of March, 1863, having appointed executors, who subsequently proved his will.

The money now in court represented the third share of Mrs. Hepburn in the residuary estate of William Michell.

Glasse, Q.C., and *W. King*, for the petitioners, who were the executors of the husband: The words of this settlement 621] point to futurity only, and do not *contain expressions such as there were in the covenant in *Archer v. Kelly* (¹), by virtue of which a change in the condition of the property from expectancy to possession brought it within the covenant. When the words of the covenant point simply to futurity, such a change of condition does not of itself bring a fund within the settlement: *In re Pedder's Settlement Trusts* (²), which has been followed lately in *In re*

(¹) 1 Dr. & Sm., 300.

(²) Law Rep., 10 Eq., 585.

Jones' Will (¹) by the Master of the Rolls in preference to *In re Viant's Settlement Trusts* (²). *Cornmell v. Keith* (³) was decided on the ground that the frame of the covenant included present as well as future interests of the wife.

[MALINS, V.C.: There was a case of *Agar v. George* (⁴), which came before me recently, in which the effect of these covenants was considered.]

In that case the frame of the covenant pointed to a present as well as future interest in property, and it was decided upon the authority of *In re Mackenzie's Settlement* (⁵).

The result of the authorities is, that a contingent reversionary interest in property to which the wife is entitled at the date of the settlement is not bound by a covenant containing words pointing only to futurity merely by falling into possession during the coverture.

J. Pearson, Q.C., and *Whitehorne*, for some of the next of kin of Mrs. Hepburn as representing the whole class, who were numerous: It is plain upon the authorities that this interest is included in the covenant. The case is distinctly within *Archer v. Kelly* and *In re Hughes' Trusts* (⁶), which were followed by Vice-Chancellor Wickens in *In re Clinton's Trusts* (⁷). The question is whether there was not such a change in the condition of the property during the coverture as brought it within the covenant.

The object of covenants of this kind is to sweep into a settlement every possible interest, and that intention [622 would be defeated if this fund was considered not to be included.

Ilbert, and *Northmore Lawrence*, for other members of the same class, were not heard.

Dibdin, for the trustees.

Glasse, in reply, referred to *Wilton v. Colvin* (⁸) and *Aicherley v. Du Moulin* (⁹).

July 31. MALINS, V.C., after referring to the facts above set forth, continued:

Upon this subject of covenants to settle future property many authorities were cited and commented upon by Mr. Glasse and Mr. King for the petitioners, and also on the other side by Mr. Pearson and Mr. Whitehorne. I have

(¹) 2 Ch. D., 362; 16 Eng. R., 791.

(²) Law Rep., 18 Eq., 436; 10 Eng. R.,

756.

(³) 3 Ch. D., 787; 18 Eng. R., 810.

(⁴) 2 Ch. D., 706; 17 Eng. R., 706.

(⁵) Law Rep., 2 Ch., 345.

(⁶) 4 Giff., 432.

(⁷) Law Rep., 18 Eq., 295.

(⁸) 8 Drew., 617.

(⁹) 2 K. & J., 186.

carefully considered all these authorities, and I cannot say that I consider that they are all of them founded on very sound principles, but I think it may be said that the result of them is this: In *In re Pedder's Settlement Trusts* (¹), which was decided by Lord Justice James when Vice-Chancellor—and though I am bound to say that I think the principle decided does not effectuate the intention of the contracting parties, there is no doubt that it was perfectly consistent with the preceding authorities—the intended wife and husband severally covenanted with the trustees that in case the marriage should be solemnized, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them in right of the wife, should at any time or times during the said intended coverture become seised or possessed of or entitled to should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land expectant on the death of a tenant for life who outlived the coverture, and therefore, no doubt, the wife was to a certain extent entitled at the date of the settlement, but she was 623] not entitled in possession, and I cannot *help thinking that the intention of the contracting parties was to affect all property which might fall into possession during the coverture. However, Vice-Chancellor James, in strict conformity, I am bound to say, with the decisions up to that time arrived at, says (²): “I think this case is virtually decided by authority. The words of the covenant are words of futurity: ‘shall during the coverture become seised or possessed of or entitled to;’ and I find nothing to warrant a departure from the literal and natural meaning of the words. This is not property with regard to which it can be averred that the husband or the wife did become ‘seised or possessed of or entitled to it during the coverture.’ No seisin, no title accrued to either of them in respect of it during the coverture; hence the property does not satisfy the words of futurity in the covenant, and consequently was not included within it.”

Now if this had been the same case, of course I should have felt myself bound by that authority; for although in a subsequent case before Vice-Chancellor Bacon; namely, *In re Vian's Settlement Trusts* (³), it was held that property to which the wife was entitled on the marriage was bound by a covenant; the Master of the Rolls, in a subsequent

(¹) Law Rep., 10 Eq., 585.

(²) Law Rep., 10 Eq., 588.

(³) Law Rep., 18 Eq., 486; 10 Eng. R., 755.

case of *In re Jones' Will* (¹), has expressed his dissent from that decision. Probably as the authorities then stood, the decision of Vice-Chancellor Bacon was hardly consistent with the decided cases, although in principle I am bound to say I think he was right. *In re Jones' Will*, a decision of the Master of the Rolls last year, was the case of a marriage settlement, by which the intended husband and wife severally covenanted with the trustees that all the real and personal property (if any) not thereinbefore settled to which the wife or the husband in her right should at any time or times during the intended coverture become beneficially entitled in possession or reversion, or in any manner whatever derivable directly or indirectly from J., should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to a fund bequeathed by J. subject to the life interest of a person who outlived the wife, and it was held that the fund was not subject to the covenant, and the head-note to the case adds, "*In re Viant's Settlement Trusts* *not followed." There the Master [624 of the Rolls says (²): "I must add one more decision to the numerous decisions on this question. I regret that a point which in the case of *In re Pedder's Settlement Trusts* (³) was said by the judge to be virtually decided by authority, should again have become open to discussion in consequence of the decision of Vice-Chancellor Bacon. The covenant provides that any property shall be settled to which the wife, or her husband in her right, should at any time or times during the coverture become beneficially entitled in possession or reversion, or in any manner whatever derivable directly or indirectly from a particular source. Inasmuch as the tenant for life outlived the wife, it is clear that she did not, nor did her husband in her right during the coverture, become entitled in possession to a fund, which was hers in reversion before the marriage took place. It is equally clear that the husband during the coverture did not become entitled in right of his wife. His title accrued, not during the coverture, but afterwards, when he took out administration to his wife's estate. The sort of inchoate title that he had during the coverture depending on the possibility of the property falling into possession during the coverture really amounts to no title at all. Property such as this is not property to which the husband or the wife became entitled during the coverture. This was settled until the case of *In re Viant's Settlement Trusts* (⁴), which is

(¹) 2 Ch. D., 362; 16 Eng. R., 791.

(²) 2 Ch. D., 364; 16 Eng. R. 793.

(³) Law Rep., 10 Eq., 585.

(⁴) Ibid, 18 Eq., 436; 10 Eng. R., 755.

quite the other way. With the greatest respect to the learned Vice-Chancellor, I must decline to follow that case. I hold that the fund is not subject to the covenant.¹¹ If this had been the same case I should have felt myself bound by *In re Pedder's Settlement Trusts* and *In re Jones' Will* (*), although in principle I should be very much inclined to agree with Vice-Chancellor Bacon in his decision in *In re Viant's Settlement Trusts*.

There are three other cases which were referred to. One is a decision of my own in *Agar v. George* (*). I have looked at that decision, and I see no reason to doubt that it was correct, because I find that I followed *In re Mackenzie's Settlement* (*), a decision of Lord Justice Cairns and Lord 625] Justice Turner; and also I think *that upon the words of the will my decision was perfectly warranted. That was a contingent interest. It was a post-nuptial settlement; the husband covenanted to settle any property which the wife, or he in her right, either then was or at any time during the coverture should become entitled to, and I held that a contingent interest in a fund standing in court to the credit of a cause which fell into possession after the termination of the coverture was bound by the covenant. The words there were to settle all property to which the wife was then entitled. I drew the distinction, and said it was evidently intended to include all property in which the wife had any interest, vested or contingent, but was accidentally omitted.

That also was the decision in *In re Mackenzie's Settlement* (*). There the covenant was to settle property to which the wife then was or should become entitled at any time during the coverture, and it was held by the two Lords Justices that the land and property of the wife to which she was entitled at the date of the settlement was bound by that covenant.

There was another authority which was mentioned, namely, that of *Cornmell v. Keith* (*), a decision of Vice-Chancellor Hall, in which the facts fall strictly within my decision following that of the Lords Justices in *In re Mackenzie's Settlement*, because there being a covenant to settle property to which the wife then was or should at any time become entitled, the Vice-Chancellor held that it bound property in which the wife had then a contingent interest; but he made an observation with which I entirely concur, although it was not necessary for the decision of that case, as there was a

(1) 2 Ch. D., 362; 16 Eng. R., 791.

(2) 2 Ch. D., 706; 17 Eng. R., 706.

(3) Law Rep., 2 Ch., 345.

(4) 3 Ch. D., 767; 18 Eng. R., 810.

covenant to settle all property to which the wife was then entitled. He says⁽¹⁾: "I may take this opportunity of stating that I am by no means disposed to put a narrow construction upon covenants like this. Conveyancers have struggled to make them sweep in every kind of property, and the form of the covenant has from time to time been added to to accomplish that object."

But the decision which I intend to follow on the present occasion, and which seems to me to rest on the soundest principle, is a decision of Vice-Chancellor Kindersley in *Archer v. Kelly*⁽²⁾. That *was a case in which the [626 wife was entitled at the date of the settlement "to a contingent interest in remainder in real estate, and was also entitled in possession to two sums of stock." That is a remarkable distinction, because the Vice-Chancellor held that with regard to the contingent interest in the real estate it was bound by the settlement, but the property to which she was entitled absolutely in possession was not bound, and the distinction he draws is this: He says⁽³⁾: "Now the language in this settlement is, 'shall by gift, descent, succession, or otherwise howsoever become entitled to.' The word 'become,' in its usual and proper acceptation, imports a change of condition, that is, the entering into a new state or condition by a change from some former state or condition. The word 'entitled' may mean entitled in possession or entitled in reversion or remainder. And whereas at the time of the marriage the wife was entitled to the property called Fieldings in remainder expectant on the death of a tenant for life, the tenant for life having died during the coverture the wife thereupon became entitled in possession. And whereas at the time of the coverture her interest was contingent on the event of the tenant for life dying without a son. That event having happened during the coverture, she has become entitled to a vested estate; there is a change in the condition of her estate or interest in the property; she has during the coverture become entitled to the property for a new estate or interest, and therefore this property falls within the terms of the covenant. The plain and natural import of the terms of the covenant has been complied with. Jane Rashleigh has, by succession or in some other manner, become entitled to the property during the coverture."

Now every word of that will apply to the present case. I have already stated that at the time of the settlement in 1842 the wife could only have become entitled to this prop-

⁽¹⁾ 3 Ch. D., 773; 18 Eng. R., 815.

⁽²⁾ 1 Dr. & Sm., 300.

⁽³⁾ 1 Dr. & Sm., 304.

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erty on two events happening in her favor, first, that her father should die in the lifetime of Sally, the wife of the testator, which he did; and, secondly, that she should be a child of her father living at the death of Sally. I have already mentioned that both those events happened; but inasmuch as she became entitled during her coverture, and, 627] as I pointed out, in 1858 all the events had *happened, she then became entitled to the property in possession. Therefore, upon those contingent events, the change in the condition, in the language of Vice-Chancellor Kindersley, took place, and therefore she became entitled to the property. Therefore, in my opinion, that brings it within that decision, and is, in my opinion, in accordance with all the decisions on the subject. I therefore on these grounds come to the conclusion that the property in question was bound by the settlement of 1842. The consequence of that is that Mr. Glasse's client will take one moiety of the fund in court instead of the whole.

Solicitors: *Dunster; Bridges, Sawtell & Co.*

[6 Chancery Division, 627.]

V.C.M., Aug. 7, 1877.

In re WEDGWOOD COAL AND IRON COMPANY.

Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104)—Reconstruction Scheme—Debenture Holders—Title to vote at Meeting—Bona fides.

Where a reconstruction scheme was resolved upon at a meeting of debenture holders under the act of 1870, the court held that the holders of debentures passing by delivery were not entitled to vote unless they produced their debentures at or before the meeting:

Held, also, that the court would not sanction a reconstruction scheme resolved upon by a majority of debenture holders, if it should appear that persons voting in favor of the scheme were not acting *bona fide* in the interests of the debenture holders.

THIS was a petition to obtain the sanction of the court to a scheme under the Joint Stock Companies Arrangement Act, 1870, for the reconstruction of the Wedgwood Coal and Iron Company, Limited.

The company was formed in 1872 for the purpose of working a colliery in Staffordshire held under the Chatterley Iron Company. The nominal capital was £200,000, in 20,000 shares of £10 each. Of these shares 15,000 were fully paid-up shares, and the debenture capital of the company, which constituted the working capital, amounted to £75,000, in 3,000 debentures of £25 each.

In August, 1875, a resolution was passed that the company *should be wound up voluntarily, and on the [628 19th of November, 1875, the winding-up was ordered to be continued under supervision. A scheme was then proposed for the reconstruction of the company under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), and meetings of the creditors were arranged with the sanction of the judge in chambers, when it was decided that such meetings should be presided over by the official liquidator, Mr. Smart. The meeting of the creditors, other than debenture holders, was held first on the 10th of May, 1877, and a resolution was then passed unanimously, approving of the proposed scheme of reconstruction.

A second meeting took place on the same day, of the debenture holders, and upon a resolution being proposed for approving of the scheme, the numbers of persons present or by proxy who voted for the resolution were sixty, and those against the resolution were fifty-five. A scrutiny subsequently took place, and it appeared from the report of the official liquidator that of the persons present at the meeting who had voted for and against the resolution many had not produced their debentures before the meeting, and could not produce them at the meeting, and there were also others who had claimed on their bonds prior to the 10th of May, the day of the meeting, but who only produced them after that day, and if these persons were not properly qualified to vote at the meeting, then the numbers in favor of the resolution would amount to forty-three, while the numbers against the resolution would be forty-six. The question therefore was, whether those persons who were debenture holders on the 10th of May and produced their debentures, were alone capable of voting, or whether persons who voted at the meeting might afterwards qualify themselves as bondholders by the subsequent acquisition of debentures. It was also reported that in either view of the case there was a majority of three-fourths in value in favor of the scheme, there having been £60,000 in value of debentures represented at the meeting, of which amount the holders of £48,075 voted for the proposed scheme, and of £12,475 against the scheme.

J. Pearson, Q.C., and Whitehorne, in support of the petition: The reconstruction scheme has been supported by so large a *body of the debenture holders and share- [629 holders, that there is no doubt of its being for the benefit of the company that the scheme should be carried through. It is the only way to make the undertaking profitable. The colliery is now being worked by the official liquidator. It

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is by his account paying its way, but more capital is required to make it profitable. In fact it is a choice between reconstruction and absolute destruction. In order to obtain the sanction of the court to a reconstruction scheme under the Companies Arrangement Act (33 & 34 Vict. c. 104), it is only necessary to have three-fourths in value of the debentures held by persons present at the meeting. This was decided in *In re Bessemer Steel and Ordnance Company* (1) and *In re Tunis Railways Company*, before your Lordship on the 22d of May, 1874, affirmed by the Lords Justices, July 11, 1874. Here we had more than three-fourths in value in favor of the scheme, and we also had a majority of the persons actually present, and so long as they were able to produce their debentures when the scrutiny took place, that is sufficient to render their votes valid.

Bristowe, Q.C., and *Nicoll*, for the majority of creditors and debenture holders in the same interest.

Glasse, Q.C., and *Romer*, for the official liquidator.

Higgins, Q.C., and *Everitt*, for debenture holders who opposed the scheme: We object to this scheme because it is opposed to the interests of the debenture holders. The majority at the meeting was obtained by dividing the debentures and giving a single bond to some of the large shareholders who were present at the meeting and who are interested in escaping from their own liability to the prejudice of the debenture holders. But we contend that the nominal majority at the meeting which took place on the 10th of May did not represent the persons really interested in the question. There are now debenture holders to the amount of £12,475 who strongly object to the scheme, and all the original directors and promoters who are holders of shares 630] are supporting it in order to *get rid of their liability. The intention of the promoters of this reconstruction will be best understood by reference to a report of the facts in this case when it came before the court in July, 1876,—*Anderson's Case* (2)—where it was decided that the holders of paid-up shares, having given no consideration for their shares, were liable to be placed on the list of contributories. This was upon the same principle as in *In re Heaton Steel and Iron Company* (3) and *Crickmer's Case* (4). The effect of the decision in *Anderson's Case* was to render Mr. Anderson, one of the promoters, liable for £35,000, Colonel Innes for £5,000, and other persons in the same position for very considerable sums of money. By the present scheme those

(1) 1 Ch. D., 251.

(2) 34 L. T. (N.S.), 943.

(3) 4 Ch. D., 140.

(4) Law Rep., 10 Ch., 614.

shareholders will get rid of those heavy liabilities, to the ruin of the debenture holders. It is true that at the meeting of the debenture holders there was a majority of persons present who voted for the scheme; but as this was contrived by distributing single debentures to the shareholders after they had voted at the meeting, we contended that their votes were invalid; and we also contend that the resolution was carried by persons who, as shareholders, were not acting *bona fide* for the interests of the bondholders, but for the purpose of escaping from their own liability as shareholders.

The court has never sanctioned a reconstruction scheme if there has been a large minority of persons opposed to it. In the case of the *Western of Canada Oil, Lands and Works Company* (before the Master of the Rolls, June 20, 1874), there was no opposition to the scheme, and the rights of the debenture holders were strictly preserved. In *In re Tunis Railways Company* only two debenture holders opposed.

The principle is the same as that which is acted upon in bankruptcy. In the case of *In re Page* (*) the creditors of a debtor resolved to accept a composition of 1s. in the pound to be paid in twelve months, but upon the opposition of a single creditor the court refused to allow the resolutions to be registered. The same principle was acted upon in *Ex parte Cowen* (*) and *Atwood v. Merryweather* (*). The case of *Menier v. Hooper's Telegraph * Works* (*) is expressly in point here, for the court in that case interfered to protect the minority of a company where the majority proposed to benefit themselves at the expense of the minority. On these authorities the court would be justified in refusing to sanction the scheme, even if there were a majority, because we show that the majority were acting with a view to benefit themselves at the expense of the minority.

Locock Webb, Q.C., and *Fellows*, for the trustees.

J. Pearson, in reply, referred to *Waterhouse v. Jamieson* (*).

MALINS, V.C.: The *Wedgwood Coal and Iron Company*, so far as I have had an opportunity of knowing, on the many occasions in which the affairs of the company have been before me, was an undertaking which originally possessed the elements of success, but I am sorry to say that the practice was had recourse to of giving the appearance of shares having been paid up in full upon which nothing had in fact been paid, and various schemes were resorted

(*) 2 Ch. D., 323.

(*) Law Rep., 2 Ch., 563.

(*) Law Rep., 5 Eq., 464 n.

(*) Law Rep., 9 Ch., 350; 8 Eng. R., 905.

(*) Law Rep., 2 H. L., Sc. 29.

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to which were, in my opinion, quite certain to bring the company to destruction, and they have accordingly done so. It has come to be wound up, and in the winding-up, although I have appointed an official liquidator, who up to this time has conducted the matter exceedingly well, the operations have resulted in this, that it barely pays its way in the present state of things, though it may do much more than that if prosperity should be restored to the coal and iron trades.

In this state of things, there being a large amount of debt—no less than £80,000 in round numbers on debentures or notes of hand passing by delivery, and common trade debts of about £5,000, making together an indebtedness of at least £85,000—there are no assets whatever to pay the creditors of the company, either the debenture or trade creditors, unless money can be obtained from the shareholders, and if they are made to pay in full there may be assets sufficient to pay the trade creditors who stand behind the debenture holders. It appears that there is a large 632] number of *shares on which not one farthing has been paid. Upon Mr. Anderson, who is one of such shareholders, I have fixed a liability, under my order of the 15th of July, 1876, to pay £35,200 on 3,220 shares. Colonel Innes, I have also decided, is liable to pay an amount of between £700 or £800, so that there is about £36,000 due from those two gentlemen alone, and I understand there are many other shareholders who have not yet paid, and by whom a large sum of money ought to be paid to meet the liabilities of the company.

[*Higgins*: Not one single shilling has ever been paid upon any share before or after the liquidation.]

Well, that is a lamentable state of things, but not more so than we are in the habit, in this court, of constantly witnessing. However, the company being carried on by the official liquidator without a loss—probably only at a small profit—and while the company was being nursed, as I may say, for better times—while this was going on a certain number of shareholders and creditors proposed a scheme of reconstruction, which is a very common thing when companies of this kind get into difficulties, with a view of turning that into prosperity which is only a state of disaster. In many instances it has been done with great success, and it is very desirable when practicable that such a course should be adopted. Accordingly a large number of shareholders and debenture holders thought it desirable that a scheme for the reconstruction of this company should be adopted,

and a petition for that purpose was presented in the month of February. The scheme was discussed in chambers, and I am far from being satisfied that if that scheme were adopted it would not be greatly for the benefit of all parties concerned. I think I can see plainly that if Mr. Anderson, and Colonel Innes, and all the other persons who are said not to have paid upon their shares, are able to pay, and are compelled to pay, it may be that the concern would do very well, because it is said there would then be the requisite amount of capital to go on with the working; but I have been assured by those who represented Mr. Anderson and Colonel Innes that they cannot pay, and therefore it seems to me to be rather a forlorn hope for the debenture holders to expect to get *money to meet their debentures, either by carry- [633
ing on the works or rejecting the scheme for reconstruction.

When the scheme was proposed the usual steps were taken in chambers to ascertain the opinion of the shareholders and creditors. A meeting was fixed and a chairman was appointed. The meeting accordingly took place on the 10th of May last in London, and I am now asked to sanction the resolution which is said to have been passed at that meeting in favor of the scheme by the necessary majority of votes of creditors and shareholders; but really the only persons interested in arguing it before me are the creditors holding debentures, who, according to law, are entitled to stand before all the other creditors, and to sweep away every part of the property to the detriment of the general creditors. I have not gone into the particulars of the reconstruction scheme, because the only question I have now to consider is whether the resolution passed at the meeting which was held is such as to be binding upon all the parties. Now although these companies are formed under the Companies Act, 1862, yet these kind of questions mainly depend upon the act of 1870, and that act in the 2d section says this: "Where any compromise or arrangement shall be proposed between a company which is at the time of the passing of this act or afterwards in the course of being wound up, either voluntarily or by or under the supervision of the court, under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the court shall direct"—all that has been done, as I have already said—"and if a

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majority in number representing three-fourths in value of such creditors or class of creditors present, either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company." In order, therefore, to make this order binding, there must be a majority of the creditors present—a majority in number and three-fourths in value of the interests must be represented; and it must be sanctioned by an order of the court. Now it cannot be sanctioned by the court unless the court is satisfied that there has been the requisite majority, first of persons, and secondly of capital or debt.

The first question that arises is, has there been a majority of persons at a meeting duly convened who have passed this resolution? That the meeting was duly convened and duly held is not contested. Then was there the requisite majority? Upon that subject it is agreed that if only those debenture holders who had produced their debentures before the meeting or at the meeting are entitled to vote, instead of there being a majority there was a minority of persons; because I have the statement of the official liquidator that of the persons present on that occasion forty-three only voted for the resolutions while forty-six voted against them. If, therefore, the proper view of the case is, that only those who were debenture holders, and who proved themselves to be so at that time, were entitled to vote, it necessarily follows that the majority was against the resolutions, and the court has no power of carrying them into effect.

But then it appears that these debentures pass by delivery, and certain persons who were present at that meeting, and had not produced their debentures before the meeting, and could not produce them at the meeting, were subsequently allowed to be added to the voting, that is, they were subsequently admitted as if they had voted at the meeting, and in that way Mr. Smart reported there were a number of debenture holders voting who had claimed on their bonds prior to the 10th of May, but who produced them only after that date; and there were also some debenture holders who both claimed on and produced their debentures on the 10th of May, and that makes up the number supporting the resolution to sixty. Adding the like classes together of those who voted the other way, it brings the number only to fifty-five, so that if these were all proper voters, then

there were sixty in favor of the resolution and fifty-five against it, making the requisite majority in favor of the resolution as to persons, and it is not disputed that there was the requisite majority of three-fourths as to capital. But I am clearly of opinion that no voters are entitled to *have any notice whatever taken of them unless they [635 could legally and properly vote at the meeting of the 10th of May. If it were otherwise, in these cases of debentures passing by delivery, it would be a farce to have a meeting and admit subsequent voters who had neither produced nor proved their title to vote at or before the meeting, because the door would be open to all kinds of fraud. A man who was at the meeting might say, "I had my debentures, I did not bring them with me, but I have them with me now," whereas they might have been given to him afterwards. Every possible misrepresentation and fraud might be practised, and it is clearly the duty of the court to prevent the adoption of any such practice. I am, therefore, bound on principle to reject every vote the title to which had not been proved at or before the meeting, and, adopting that principle, the result is that there is a majority against the resolution, because the numbers were forty-six against and only forty-three in favor of the resolution.

However, I should be sorry to decide the case simply on that narrow and technical ground, because I feel myself warranted in rejecting these resolutions on higher grounds than this. I think it is perfectly clear that all resolutions of this kind, whether they are resolutions by a majority of debtors to bind the minority, as in bankruptcy, or whether they are by a majority to bind a minority under any act of Parliament, must be passed *bona fide* and without sinister objects; and when I find a meeting attended by such a debenture holder as Mr. Anderson, owing to the company £35,000 and upwards upon shares, and holding only one debenture for £25, what conclusion can I come to but that Mr. Anderson is anxious to support this scheme, because if he succeeds he is relieved from the payment of £35,000, and may only lose £25 as a debenture holder? Can I, under such circumstances, regard him as a disinterested voter? Can I do otherwise than regard him as going to the meeting to support these resolutions for any other object than to get rid of that liability which he incurred, according to my view, by a course of proceeding of a most improper character, by endeavoring to obtain shares as fully paid-up shares when he had not paid a penny for them. My opinion was, when his case came before me, that there was no justification

whatever for his conduct, and I remain of the same opinion now.

636] *So in the same way with regard to Colonel Innes. He also is liable to pay a considerable sum of money, although it is insignificant compared with what Mr. Anderson has to pay, and he goes to the meeting for the purpose of getting rid of a very heavy liability as shareholder, and running a much smaller risk as a bondholder.

Now, on principle, I think the case of *In re Page*(¹) is entirely applicable to this. That was a case in bankruptcy, and every one knows that three-fourths of the creditors in value can bind the minority. There, a butcher became a bankrupt, his assets consisted of £5 in cash and £371 in stock-in-trade, book debts, and so forth, and his debts were £1,200, so that according to the statement laid before the creditors his assets were enough to pay 4s. or 5s. in the pound; but the statutory majority of creditors resolved to accept 1s. in the pound, payable by instalments during the year. What could this be? Not a *bona fide* regard for the interest of the creditors, but a mere favor shown to the debtor or bankrupt. The Registrar in Bankruptcy has a right to decide whether a resolution shall be registered or not, and the registration of this resolution was opposed by Mr. Beer, a creditor for £50 12s. Mr. Registrar Keene refused to register the resolution, and his decision was affirmed by Mr. Registrar Hazlitt, acting as Chief Judge. The debtor appealed, his object being to get off the payment of his debts by paying 1s. in the pound by instalments extending over a year. The thing was ridiculous, in my opinion. However, there was the statutory majority of creditors, and according to the act of Parliament it was binding, but Lord Justice James says: "Two Registrars in succession have come to the conclusion that these resolutions were not such that the majority of the creditors could reasonably and properly bind the minority by them. I agree in this conclusion. The Legislature has given great power to the majority, but it must be exercised *bona fide* in the interests of the creditors, and not from motives of kindness to the debtor. There must be a *bona fide* resolution by the creditors dealing as creditors. Here both the Registrars thought that the composition of 1s. in the pound was, having regard to the amount of the assets as shown by the 637] debtor's own *statement, a mere sham. I think so too. The appeal will be dismissed with costs." A similar

(¹) 2 Ch. D., 323, 324.

point was decided in *Ex parte Cowen* (¹), which was cited in that case.

Now, therefore, these cases show distinctly that it is not enough merely to obtain the statutory majority. The court, before it gives its sanction (without which the resolution cannot be acted upon), must be satisfied that the resolution has been carried *bona fide* by persons who really have regard to the interests of the company, and who have not voted merely for the purpose of exonerating themselves from a liability which they have incurred. I am well satisfied in this case that Mr. Anderson at least, and probably Colonel Innes, and I have no doubt many others, were not actuated in the vote they gave by a *bona fide* regard for the interests of the company, but gave those votes merely for the purpose of getting out of the liability which they had incurred, and incurred by a course of conduct, as to one of them, of a most improper description.

First, therefore, because there was not the statutory majority, and, secondly, because if there had been the statutory majority, constituted as it was, it could not be treated as a *bona fide* majority, I refuse to sanction the scheme as passed at those meetings. Consequently, I suppose another meeting must be held.

Higgins, Q.C., asked that the petition might be dismissed.

MALINS, V.C.: I think the proper course is that the petitioners should pay the costs up to the present time, including the costs attending the holding of the meetings, and the petition will then stand over, with liberty to the petitioners to apply in chambers for further directions as to the holding of any other meetings as they may be advised.

Solicitor for petitioners: *J. Vernon Musgrave*.

Solicitors for other parties: *Mercer & Mercer; Lowless & Co.; Stibbard & Cronshey*.

(¹) Law Rep., 2 Ch., 563.

[6 Chancery Division, 638.]

V.C.B., June 6, 8, 9, 10, 12, 1877.

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[1875 M. 240.]

Solicitor and Client—Gift—Influence.

To prevent the operation of the rule that a solicitor shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation, or even suspicion, but there must be a severance of the confidential relation.

THIS was a suit by the executors of the late Rev. H. C. Morgan for the administration of his estate, and for the purpose of setting aside certain releases given by him to the defendant Minett, who was at the time his confidential solicitor, in respect of sums of money owing by Minett to the testator.

The testator, who was vicar of Goodrich, near Ross, in Herefordshire, and a country magistrate, succeeded, on the death of his brother, in 1864, to a large estate of real and personal property, with an income of £7,000 a year. He was unmarried, and had no near relations, and up to this time had been a comparatively poor man.

The defendant Minett was clerk to the magistrates in the division in which the testator acted, and in this capacity their acquaintance first commenced about 1855, since when he, Minett, acted as the testator's solicitor and agent, and had managed all his investments and business. They were on terms of close intimacy, and the testator, who was much attached to Minett, was in the habit of lending him money. Soon after coming into his brother's property the testator made the defendant an allowance of £100 a year, and by his will and codicils, which were very numerous, he gave him various legacies, which were expressed to be "for his gratuitous and kind services during many years past," and also gave legacies to Minett's wife and children.

In September, 1874, Minett, at the testator's own spontaneous request, prepared two releases of the various sums which had been lent to him by the testator and by the testator's brother and predecessor in the estates, Mr. Francis 639] Morgan, amounting in all *to £3,000. The releases, which were dated the 1st and 2d of October, 1874, were executed by the testator and returned to Minett, who, considering, as he said, that the releases were given to him instead of additional legacies, told the testator that he should continue to pay interest upon the debts, and did so.

In the same month of October, 1874, upon the occasion of the execution of a further codicil, Mr. Gwynne James, a solicitor of Hereford, was called in at Minett's request, who explained that the testator, who was a very old friend and client, had by his will and various codicils given him and his family considerable benefits, and had also released him from some debts.

These transactions having been carried out without the intervention of any other solicitor, the defendant stated that he was anxious that some solicitor totally unconnected with him should see the testator and explain to him fully what

those transactions were, and if satisfied that the testator knew and fully understood what he had done, a codicil confirming the previously made will should be signed. Mr. James came over to Ross on the 9th of October, and, after being furnished with an epitome of the will and previous codicils, the releases and a statement of the benefits given by the testator to Minett and his family, prepared a codicil in Mr. Minett's office. This codicil, as originally prepared, with the exception of two small legacies to persons named McClaverty, was merely a confirmation of previous dispositions.

Armed with these documents, Mr. James, accompanied by Mr. Minett, went over to Goodrich Castle, the testator's residence, and there saw him alone. During the interview Mr. James went through the epitome and the new codicil very carefully with the testator, who pointed out one or two errors in names, and insisted upon the insertion of a legacy to a Mr. Clark, an old friend, and quite satisfied Mr. James that he thoroughly understood what he had been doing. One of the servants was called in, and in his presence and that of Mr. James the testator executed the codicil. Mr. James then called his attention specially to the fact that he had given Minett the releases of the 1st and 2d of October, and asked him if it was his intention to release the debts in addition to the benefits he had already given Minett and his family. The testator replied that it was so, and satisfied Mr. James that the *releases did represent his mind [640 and wish. Mr. James then wrote at the foot of the epitome the following memorandum: "The bequests made to the said H. Minett are in addition to a release given to him by deed dated the 1st of October, 1874, of a debt of £2,100 due from him, and to a second release given to him by deed dated the 2d of October, 1874, of a debt of £1,000 due from him, with a reconveyance of the offices in Ross mortgaged for the last mentioned sum"—and left this document with the testator. Mr. James also gave evidence to the effect that he found the testator during this interview very cheerful and intelligent for a person of his age, and perfectly competent to transact business, and that he expressed his gratitude towards Minett, and his wish to benefit him, and to adhere to the two releases he had already executed. Evidence was also given of conversations in which the testator spoke of Minett to others as well as to Mr. James in very affectionate terms, saying how much he appreciated his assistance and services, that he could not do without him, that

he was entirely his right hand, and that he did not know what he should do if he lost him.

In February, 1875, the testator executed a release (also prepared by Minett) of a further sum of £500 due from him, making a total amount of £3,600.

The testator died in July, 1875, aged eighty-four, and the plaintiffs, who were relations and two of his executors (Minett being the third executor), sought in this suit to set aside the releases of October, 1874, and February, 1875, as having been executed by the testator while under the professional influence of Minett, and without proper independent advice.

Kay, Q.C., *Willis*, Q.C., and *Nalder*, for the plaintiffs: The releases in question, which are admittedly without consideration, were prepared by the defendant himself during the continuance of the confidential relation of solicitor and client between the testator and himself, and without the intervention of any independent solicitor, and must therefore be set aside.

In the case of a purchase from a client the parties are at arm's length, and although the court regards such transactions with great jealousy, and the *onus* is thrown upon the [641] solicitor of *showing that everything was perfectly fair, and that no advantage was taken, there is no rule to the effect that a solicitor is absolutely precluded from purchasing his client's property while the professional relation exists. But in the case of gifts the rule is far more stringent and is absolute. So long as what has been termed "the crushing influence of the solicitor" exists, any transaction of gift is supposed to have been motived by that influence, and accordingly, from the extreme difficulty of showing that everything was voluntary and fair, with full warning and with perfect knowledge, it is almost impossible, even where there is no ingredient of fraud, and however morally just the transaction, however deserving the particular recipient, that the solicitor can take any benefit from his client by way of gift: *Tomson v. Judge* (*); *Middleton v. Welles* (*); *Hatch v. Hatch* (*); *Lady Ormond v. Hutchinson* (*); *Wright v. Proud* (*); *Montesquieu v. Sandys* (*). If the connection has been severed in such a way as that the influence may be considered at an end and the parties are at arm's length, then a ratification, such as will be set up here, may be of

(*) 3 Drew., 306.

(*) 1 Cox, 112; 4 Bro. P. C., 245.

(*) 9 Ves., 292.

(*) 13 Ves., 47.

(*) 13 Ves., 136.

(*) 18 Ves., 302.

some value; otherwise it is perfectly worthless: *Wood v. Downes*(¹); *Holman v. Loynes*(²).

H. Matthews, Q.C., and *Blackmore*, for the defendant Minett: The evidence shows that in giving these releases the testator was a perfectly free agent, under no pressure, influence, or even suggestion on the part of Minett, and actuated solely by feelings of gratitude and personal regard, encouraged, no doubt, by professional services, but engendered by a friendship of many years. All influences are not unlawful; motives of affection or gratitude for past services are perfectly legitimate, and may be fairly pressed: *Hall v. Hall*(³). The *onus* of proof in transactions of this kind is no doubt thrown upon the solicitor of showing that he took no advantage of his professional influence, and dealt with his client exactly as a stranger would have done. But at most a suspicion attaches upon the transaction calling for minute examination, **Harris v. Tremenhoe*(⁴); [642 and the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client, which is only looked at as creating the influence: *Re Holmes' Estate*(⁵). But when the obligation upon the solicitor has been discharged, and it is shown by separate and independent evidence that the gift was a voluntary and deliberate act, the result of the donor's free will, and coupled with the intervention of some indifferent person, there is nothing *ipso facto* in the relation of solicitor and client which makes it absolutely impossible for a solicitor to receive a gift from his client: *Hunter v. Atkins*(⁶); *Walker v. Smith*(⁷). In the last case, which we cite for the statement of the law, although legacies to a solicitor and his family were upheld, a gift failed as there was no evidence that the gift was really made. "If," says Lord Romilly, "she had called in a third person who had no interest in the matter, and said, 'I have deliberately given this £500 to Mr. Smith (the solicitor) for the benefit of himself and his children, or for his own benefit exclusively,' then I should have upheld the gift." In this case that ingredient is exactly supplied by the evidence of Mr. Gwynne James. The very strong remarks in *Tomson v. Judge*(⁸), that "the view of this court is that the rule with regard to gifts is absolute; that it is not open to the attorney to show that the transaction was fair; but that the gift cannot

(¹) 18 Ves., 120.

(²) 4 D. M. & G., 270.

(³) Law Rep., 1 P. & M., 481.

(⁴) 15 Ves., 34, 40.

(⁵) 3 Giff., 337.

(⁶) 3 My. & K., 113.

(⁷) 29 Beav., 394, 398.

(⁸) 3 Drew., 306, 315.

stand;" and further, those commenting upon Lord Eldon's view in *Harris v. Tremenheere* ⁽¹⁾ are merely *obiter dicta*, and opposed to *Hunter v. Atkins* ⁽²⁾ and the general current of authorities.

A distinction is taken where the attorney is not attorney *in hac re*, *Montesquieu v. Sandys* ⁽³⁾; *Edwards v. Meyrick* ⁽⁴⁾; and if not attorney in the particular matter, or if the cause in respect of which the gratuity is given be over, the liberality, however excessive, will not be set aside: *Oldham v. Hand* ⁽⁵⁾; *Newman v. Payne* ⁽⁶⁾; *Hindson v. Weatherill* ⁽⁷⁾. Consider the position of the testator, a [643] warm-hearted, generous old man with a large *property and superabundant revenue which he did not and could not spend, with no near relatives having claims upon him, and there being nothing to render it imprudent, unadvisable, or even rash to give this bounty. What more natural than that, having a strong feeling of friendship for Minett—a source of kindness and preference altogether legitimate and pure—he should be minded to forgive him debts which Minett might have a difficulty in paying, and the payment of which was absolutely immaterial to the testator? Is the solicitor of such a man to be a pariah, outside human sympathies and regards, incapable of receiving bounty from him? "No law that is tolerable among civilized men—men who have the benefits of civility without the evils of excessive refinement and overdone subtlety—can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised or that the attorney availed himself of his situation to withhold any knowledge or to exercise any influence hurtful to others and advantageous to himself": *Hunter v. Atkins* ⁽⁸⁾. The gifts were the voluntary, unsuggested act of the testator; and that which has been always regarded as a very material element in these cases is not wanting. Mr. Gwynne James, an independent solicitor of eminence, was called in by Minett's advice, fully satisfied himself that the releases represented the testator's own free and unbiassed act, and did what was equivalent to giving him independent advice in the transaction. So long as the testator had the benefit of competent and independent advice in the matter, neither the age nor capacity of the person conferring the benefit, nor the nature of the benefit confer-

⁽¹⁾ 15 Ves., 34.

⁽²⁾ 3 My. & K., 113.

⁽³⁾ 18 Ves., 302, 313.

⁽⁴⁾ 2 Hare, 60.

⁽⁵⁾ 2 Ves. Sen., 259.

⁽⁶⁾ 2 Ves., 199.

⁽⁷⁾ 5 D. M. & G., 301.

⁽⁸⁾ 3 My. & K., 113, 135.

red, have any materiality in cases of this nature: *Rhodes v. Bate* (').

Kay, in reply: It has been attempted to discredit the authority of Vice-Chancellor Kindersley in *Tomson v. Judge* ('), in which he contrasts Lord Eldon's own authority in *Hatch v. Hatch* (') and other cases, following *Welles v. Middleton* ('), with his decision in *Harris v. Tremenneere* (').

*We submit that the observations in *Tomson v. Judge* (') are fully borne out by the authorities; but in any case *Harris v. Tremenneere* (') turned upon a gift of leases, which is very distinguishable, as a lease, however beneficial, involves obligations and is rather in the nature of a purchase, and not like a mere gift of money or release of an existing debt; and the observations of Lord Eldon are addressed to dealings between solicitor and client in the case of purchase, which is clearly distinguished from mere bounty. *Hunter v. Atkins* (') contains an accurate statement of the law as to transactions of sale and purchase between persons standing to each other in the relation of solicitor and client; but the observations of Lord Brougham, so far as he places gift and purchase upon the same footing, are too wide; and, moreover, in that case no confidential relation of solicitor and client existed between the parties.

In both *Walker v. Smith* (') and *Re Holmes' Estate* ('), which have been cited for the *dicta*, the gifts were set aside, and those cases cannot assist the defendant.

The cases show clearly that while the relation of solicitor and client exists, and it cannot be said that the influence arising from that relation has been terminated, a solicitor cannot take from his client any gift or reward, and that there can be no valid security for such a gift in the course of their business; in other words, that a transaction of bounty cannot possibly be supported: *Newman v. Payne* ('); *Montesquieu v. Sandys* ('); *Rhodes v. Bate* ('). As stated in *Tomson v. Judge*, the law is that any transaction of gift flows presumably from the influence produced by that relation, and consequently is void in the eye of this court, or, as stated in *Re Holmes' Estate* ('), "makes it almost impossible that the gift can prevail." Can it be said that the relation of solicitor and client was put out of the case completely; that the influence exercised by Minett over his client's mind

(') Law Rep., 1 Ch., 252.

(2) 8 Drew., 306.

(3) 9 Ves., 292.

(4) 1 Cox, 112.

(5) 15 Ves., 34.

(6) 8 My. & K., 113.

(7) 29 Beav., 394.

(8) 3 Giff., 337.

(9) 2 Ves., 199, 201.

(10) 18 Ves., 302.

(11) 3 Giff., 337, 345.

was practically abrogated at the time he made these releases; that he had independent advice, which would operate as a guard and protection *against that influence which existed in a most exaggerated form and extent? Can it be asserted that these gifts were not made under the direct pressure of that influence in favor of the man who ought to have guarded this lavish testator against his acts of excessive bounty? In addition to the existence of influence at the time, there was concealment of the transaction with the utmost care during the testator's lifetime, and that want of full and frank disclosure which would invalidate even a transaction of purchase and sale, which stands on a different footing from that of mere bounty.

BACON, V.C.: This case must be decided, not upon the facts alone, although they are not to be disregarded, but upon a simple question of law. The law I take to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client. That is the rule of law, a rule which, if it was necessary for me to justify it, I should say was requisite for the safety of society. However, it is not for me to justify it, because I find the rule clearly and plainly established for a very long time and without qualification. There may be circumstances which would show that that relation has been put an end to, so that the parties are at liberty to deal notwithstanding the former existence of that relation. In all the cases that have been referred to there has been no doubt whatever thrown upon the rule to which I advert, although in each of the cases there has been a careful investigation and scrutiny into the facts to ascertain whether the case then to be decided came within the rule, or whether there were circumstances which prevented the application of it. In none of the cases which have been decided has the rule been denied; certainly *Harris v. Tremheere* ⁽¹⁾ is not one, because there there were three different subjects of consideration, the relation of solicitor and client having existed in that case. As to the first point, the court was satisfied that it was not a gift to the solicitor, but a gift to the lady, who was either married or was about to be married; as to the second, that it came within the character of a purchase, that the granting of the leases carried with it an obligation on the part *of the person to whom they were granted, so that it could not be called a gift; and as to the third there was no doubt about it. But the case which was most particularly noticed in the course

(1) 15 Ves., 34.

of the discussion is *Tomson v. Judge* ⁽¹⁾ not only because of the authority of the court, but for the value of the elaborate scrutiny and investigation and comment on all the cases which up to that time had been decided, and the distinction which justice requires, which was there drawn between cases of purchase by a solicitor from his client and cases of gift by a client to his solicitor. The law, in accordance with every case that has been decided, is found to be the same. It cannot be said that that often-noticed case of *Hunter v. Atkins* ⁽²⁾ forms any exception to it, because the decision there proceeds on the fact that there was no such relation between the parties; and that being so, of course there is no law in this or any other country, that I know of, which would prevent a man from doing what he pleases with his own property or money, whether by way of gift or otherwise. But a great deal of observation is contained in that judgment of *Hunter v. Atkins*, which has been often commented upon and often criticised, with which I need not trouble myself at present, because the decision, which is the only thing that I am bound by, does not relate to such a state of circumstances as exists before me in this case. That the relation of solicitor and client existed between Mr. Minett and the testator is not called in question in the slightest degree. It is not said that that relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor that relation must be severed. The parties must be, as one of the cases says, "at arm's length." The relation must have ceased to exist. If that can once be established, there is an end to the influence; whatever the influence may have been before need not be inquired into; the influence does not exist when that state of circumstances is brought about, and then the client may as well give to a solicitor as give to any other person. The degree of influence need not be inquired into. The fact of the influence is enough if it be established. These courts *have not those golden scales which [647 are said to be used in the mythological heaven to regulate the destinies of mankind. You cannot inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused; and the rule is not a hard one upon a solicitor. A client inclined to bestow bounty upon his solicitor is at perfect liberty to do it, and the solicitor is at

⁽¹⁾ 3 Drew., 306.

23 ENG. REP.

⁽²⁾ 8 My. & K., 118.

perfect liberty to accept it, but both of them must act under circumstances which preclude the possibility of suspicion, for suspicion is enough. Suspicion is the basis of that rule of influence, and nothing could have been easier in the case before me than for Mr. Minett, who is proved by himself to have had influence—I was going to say unbounded influence—over the testator, to have said, “We have been in this relation together for all these years, you desire to confer bounty upon me, the law does not enable me to accept it while we stand in that relation to each other, the law does not preclude you from giving it to me, but it prevents me from accepting it while that relation exists, therefore let us put an end to that relation, let us stand as strangers to one another. I cease to be your solicitor, nobody can then say that I have any influence arising from that character, and then give me whatever you like.” That is not what was done in this case; not only does the relation exist up to the day of the testator’s death, but Mr. Minett has very carefully proved, so far as he can, and so far as the witnesses can, the extent of that influence, and if it be less than unbounded, I do not know in what words to express it. It is very difficult, in my mind, to contemplate a case in which influence could be greater than that which Mr. Minett, honestly enough, no doubt, exercised over the testator, and it is under these circumstances that the three releases the subject of this suit were given by the testator to Mr. Minett. The only ground of defence which has been stated is that disclosed by Mr. Gwynne James’ evidence. When that is examined what does it come to? Mr. Minett having obtained these releases, two of them at least, without the intervention of any other person, without explanation to any other person, without disclosure of the fact to any other person, bethinks himself that it would be right to have Mr. Gwynne James to give explanations to the testator or to prepare the codicil to his will, and accordingly Mr. Gwynne James, who is a person of the highest respectability and whose evidence *may be received without the slightest qualification, is first summoned by Mr. Minett to his office, where he lays before him an epitome of the several wills which the testator had up to that time executed, and a statement, moreover, that he had executed two releases which were then in existence, forgiving considerable debts due from Mr. Minett. A request had been made to Mr. James to wait upon the testator. For what purpose was he to wait on him? To ascertain whether the testator knew perfectly well that he had released Mr. Minett and

had made the will. That will is out of the question at present, but that he had executed the releases, the testator knew perfectly well himself. He was not an imbecile man, he was not short-witted, he knew perfectly well what he had done. Mr. James, furnished with that information, goes to the testator, carefully goes through with him the lists of the bequests that he had made by his wills and codicils, ascertains that they were exactly what he meant, and learns from him also that he had released Mr. Minett, his solicitor, upon the two occasions referred to. Is that what the law requires? The law requires that the relation should be severed in the first place. It requires that in consequence of that severance some independent advice should be obtained by the donor. Mr. James in his examination does not say (and of course if he had done it he would have said so) that he ever explained to the testator what the law was upon the subject, or why the interference and advice of an independent person was necessary. He does not give him any of that advice, or any of that information or explanation of the law which it was indispensably necessary to do in order to give validity to the two releases which had been executed by the testator gratuitously and in favor of his solicitor. That is the whole case. Upon the case admitted we have the fact that Mr. Morgan, the testator, being under the unquestionable influence of a solicitor, having strong regard for him, being unable to move without him, did (whether of his own free will or in consequence of solicitation nobody alive can tell) execute these two releases in rapid succession. Why one was executed on one day and the other on the next day there has not been a particle of explanation. They were prepared by Mr. Minett in his own handwriting, sent to the testator in an exceedingly off-hand way, with directions that he should execute them and get them attested, and the schoolmaster comes and *attests the execu- [649 tion, and they are sent back to Mr. Minett, and that is all. Not one word of explanation, no reason suggested, no reason even by Mr. Minett why these releases should be executed. If, under these circumstances, a gift obtained by a solicitor from his client with no more information than is furnished me upon this occasion can stand, then I say that I cannot reconcile that with the plain law on the subject, a law which has been in existence for a long time, and in my opinion is absolutely necessary, which inflicts no hardship upon the donor or donee, and which makes that clear which ought to be clear considering the relation of the par-

ties. I am therefore of opinion that the plaintiffs have established a case for having these releases set aside.

I have not observed upon the third release, because it is not necessary to do so. That was unquestionably executed at the time when the relation subsisted, and as to that it is not pretended that advice or any thing of that sort was furnished to the testator. There must therefore be a decree to set aside those three releases, which is all that I have to decide in this case.

Solicitors: Collyer-Bristowe, Withers & Russell; Thomas Fortune.

See 12 Eng. R., 304 note; 12 Eng. R., 101 note.

The principal case holds the rule relative to gifts to attorneys and counsel, clergymen, physicians and surgeons, and other persons standing in confidential relations to the donor, more strictly than it is held by the courts of this country. A gift to such person, when shown by direct or circumstantial evidence to have been understandingly made, by a person competent to make it, without fraud or imposition by the donee is here held valid: 1 Sto. Eq. Jur., §§ 811-814; Darlington's Appeal, 86 Penn. St. R., 512.

The rule here also is, that a bequest or a legacy to the scrivener of a will, though a suspicious circumstance requiring explanation, and presumptively invalid, may be shown by circumstances to have been understandingly made by the testator, and if so made it will be sustained: 12 Eng. R., 103 note; 1 Redf. on Wills (4th ed.), 514-5; Bigelow on Fraud, 190-222, 266-270, 272; Kerr on Frauds and Mistakes, (Am. ed.), 168 *et seq.*, 192 *et seq.*; O'Hara on Wills, 545; Cheat-

ham v. Hatcher, 30 Gratt. (Va.), 56, 69-71; 2 Vir. L. J., 233; Riddell v. Johnson, 26 Gratt. (Va.), 152; Lyon v. Home, L. R., 6 Eq., 655, 16 Week. R., 824; Children's Aid, etc., v. Love-ridge, 70 N. Y., 387, 403-5; Marvin v. Marvin, 3 Abb. Dec., 192; Coffin v. Coffin, 23 N. Y., 9; Evans v. Ellis, 5 Den., 640; Matter of Welch, 1 Redf. Surr. R., 238; Booth v. Kitchen, 3 Redf. Surr. R., 52, 57-66, and cases cited; Lake v. Ranney, 33 Barb., 49; Wilson v. Moran, 3 Bradf., 172; O'Connell v. Butler, Milward (Irish Ecc.), 97; Gore v. Gahagan, Id., 217; Carroll v. Carroll, Id., 434; Percy v. Westropp, Id., 495; Parker v. Parker, Id., 541; Steward v. Snow, Id., 615; Daniel v. Hull, 52 Ala., 430; Beal v. Mann, 5 Geo., 456; Cramer v. Crumbaugh, 3 Md., 491; Downey v. Murphy, 1 Dev. & Bat. (N.C.) Law, 82.

The rule also obtains as to dealings between principal and agent.

Though its application ceases after the relation has ceased for a sufficient time, so that the circumstances show they dealt understandingly: Walker v. Derby, 5 Bissell, 134.

[6 Chancery Division, 649.]

V.C.B., June 15, 1877.

WRIGHT V. LAMBERT.

[1873 W. 123.]

Administration—Reversionary Interests—Tenant for Life—Mode of calculating Tenant for Life's Interest.

Testatrix, being possessed of reversionary interests, bequeathed them to a tenant for life, with remainder over. Before the reversionary interests fell into possession, the devisee for life died.

The reversionary interests having afterwards fallen in :

Held, that, in estimating what was due to the estate of the devisee for life, the value of the reversions must be calculated as at the end of a year from the testatrix's death, on the assumption that they would fall in when they actually did; and that the devisee for life was entitled to £4 per cent. on that amount from the death.

Wilkinson v. Duncan (1) followed.

FURTHER CONSIDERATION. William Sowerby died in 1855, having by his will, dated the 30th of November, 1852, devised and bequeathed a dwelling *house and prem- [650
ises and a sum of £6,000 upon trust for his wife Elizabeth for life, and after her death for the benefit of Amelia Hill, spinster, in like manner, as was thereafter expressed respecting his residue. He bequeathed £4,000 upon trust for his niece Sarah, wife of John Wingrove, for life, for her separate use without power of anticipation, and afterwards for her children, and in default, to fall into his residue. He bequeathed a house, No. 1 Devonshire Terrace, to his wife for life, and afterwards upon trust for Amelia Hill as before. He also bequeathed a house, No. 2 Devonshire Terrace, to Mrs. Wingrove for life, and afterwards to her children, and in default of children for the benefit of Amelia Hill as before. The residue of his real and personal estate testator devised and bequeathed upon trust, during the joint lives of his wife and Amelia Hill, to pay the rents of the former and the proceeds of the latter unto and equally between them, and after the death of either, to pay the whole to the survivor for life, and after the death of the survivor, he directed the whole to be for such person or persons as Amelia Hill should by deed or will appoint.

By a deed-poll, dated the 7th of May, 1855, Amelia Hill appointed all the property over which she had disposing power under W. Sowerby's will to herself absolutely.

In 1859 Amelia Hill married Charles Ferguson, who died in 1865. There was never any issue of the marriage.

(1) 23 Beav., 469.

Amelia Ferguson, widow, died on 30th of May, 1866, having by her will, dated the 6th of January, 1866, after directing the payment of debts, funeral and testamentary expenses, legacies, and an annuity, bequeathed to two trustees and executors, of whom Thomas Wright became the survivor, the residue of her real and personal estate, upon trust to invest, and pay the produce of the investments to her mother, Hannah Hill, during the joint lives of the said Hannah Hill and Elizabeth Sowerby, widow, and after the death of either, she gave several charitable legacies, directing as follows: "The said charitable legacies to be paid out of such part of my personal estate as may by law be bequeathed for charitable purposes;" and other pecuniary legacies. Amongst the legatees was the executor Thomas Wright.

She then gave to the trustees of her will a legacy of £2,500 upon trust to invest the same, and pay the annual produce to her cousin Edward Hill for life, and afterwards upon 651] trust for his *children as therein mentioned. She gave another legacy of £2,500 upon trust in like manner for her cousin Ellen Hill for life, for her separate use without power of anticipation, and afterwards upon trust for her children. She gave a further legacy of £3,000, upon trust, for her mother's brother Edward Hill for life, and afterwards for the benefit of his children; a further legacy of £3,000, upon trust, for her mother's sister Mary, wife of James Galbraith, for life, for her separate use without power of anticipation, and afterwards for her children; a further legacy of £3,000 upon trust for her mother's sister Jane, wife of John Lambert, for life, for her separate use without power of anticipation, and afterwards for Jane Lambert's daughter Jane, the wife of Thomas Stott, for life, for her separate use without power of anticipation, and after the deaths of Jane Lambert and Jane Stott, for the benefit of the children of the latter. She then gave a further legacy of £3,000 upon trust for her mother's sister, Margaret Hill, for life, and after the death of Margaret Hill, and on failure of any of the above-mentioned classes of children, the respective legacies were to fall into the residue.

Testatrix then directed her trustees to invest the residue and pay the annual produce to her mother, Hannah Hill, for life, and after her death to stand possessed of the same upon trust for Simon Dickson Graham absolutely.

The testatrix's estate was insufficient to pay all these legacies in full.

Hannah Hill, the testatrix's mother, died on the 19th of

August, 1868, having by will appointed the before-mentioned Thomas Wright her sole executor.

Simon Dickson Graham, the residuary legatee under the testatrix's will, died on the 27th of February, 1871.

Elizabeth Sowerby, the tenant for life under William Sowerby's will, died on the 1st of September, 1871.

The bill was filed on the 16th of May, 1873, by Thomas Wright against Jane Lambert, widow, Thomas Stott and Jane his wife, and their five infant children, for the administration of the testatrix Mrs. Ferguson's estate.

It stated the above facts, and as follows :—

“12. The said Elizabeth Sowerby was in the eighty-sixth year *of her age at the time of the death of the testatrix Amelia Ferguson, and as her life interest might in the course of nature be expected to terminate soon, it was considered, and was in fact, for the benefit of the testatrix's estate to await the falling into possession of the testatrix's reversionary interests under the said William Sowerby's will, rather than incur the disadvantage of selling them whilst reversionary; and accordingly the realization of this portion of the testatrix's property was deferred until the death of the said Elizabeth Sowerby.”

“29. By reason of the reversionary character of the bulk of the testatrix's assets during the said Hannah Hill's life, no payment was ever made to the said Hannah Hill out of the testatrix's assets in respect of her estate and interest in the income thereof under the testatrix's will; nor has any payment or appropriation been made to her executor since her death in respect of such her estate and interest; and the plaintiff, as such executor as aforesaid of the said Hannah Hill, is advised and claims that the said Hannah Hill's estate is entitled not only to receive from the testatrix's estate the income which, from the testatrix's death down to the said Hannah Hill's death, accrued from the testatrix's property, but also to be placed in the same position with regard to the income from the testator's reversionary property as if such reversionary property had been actually realized so as to produce income at the expiration of one year after the testatrix's death; and, accordingly, that the value at the expiration of such year of testatrix's reversionary interest in the different portions of the said William Sowerby's estate ought to be ascertained; and that the difference between such value and the amount which in each case was in fact subsequently realized ought to be considered as income arising from the testatrix's estate; and that the estate of the said Hannah Hill is now entitled to receive out of the testator's assets

such a sum as shall represent the proper proportion of such income according to the period during which the said Hannah Hill survived the testatrix."

The decree was dated the 27th of June, 1873, and the Chief Clerk's certificate was made on the 6th of March, 1877.

He found, amongst other things, that of the reversionary interests to which the testatrix was entitled at her death, 653] part fell *into possession on the 1st of September, 1871, and part was still outstanding, expectant on the death without issue of Mrs. Wingrove. He also found as follows:

"The net value, after deducting succession duty, on the said 1st day of September, 1871, of the said reversionary interests which so fell into possession on that day as aforesaid was the sum of £18,380 18s. 9d.; and the net value thereof on the 30th day of May, 1867, being the expiration of one year after the testatrix's death, was £11,482."

From the evidence it appeared that the former of these two valuations was based upon the sums which were actually received in respect of the reversionary interests when they fell in; the latter was an actuary's estimate of what on the 30th of May, 1867, was the then present value of the same sums, having reference to Mrs. Sowerby's age, according to the ordinary tables of life average.

The cause now came on upon further consideration.

Kay, Q.C., and Mounsey-Heysham, for the plaintiff, Thomas Wright: The testatrix having herself marshalled the assets in favor of the charities, the charitable legacies do not abate: *Robinson v. Geldard* (').

In our character of legatee under the testatrix's will, we contend that what the estate of Mrs. Hill, the devisee for life, is entitled to is interest at £4 per cent., from the testatrix's death to her own death, upon the value of the reversionary interests as they stood at the expiration of one year from the testatrix's death; such value being estimated according to the ordinary average life tables. That is to say, her estate is entitled to interest at 4 per cent. for two years and a fraction, on £11,482, the sum found by the Chief Clerk.

In *Wilkinson v. Duncan* ('), Lord Romilly, M.R., laid down a different rule. As the devisee for life in that case, as here, received nothing till the reversionary interests fell in, the Master of the Rolls held that the devisee for life was entitled to income *upon the value at the end of one year from the death, calculated not upon the expectancy accord-

(') 3 Mac. & G., 735, 742.

(') 23 Beav., 469.

ing to tables of life average, but upon the assumption that it would fall in when it actually did.

This rule, we submit, is not the law of the court, since *Brown v. Gellatly* (*). Why should the devisee for life get more or less than the estimated value at the time when she became entitled? The result cannot alter the value of the expectation.

Warmington, for the executors of S. D. Graham, and some pecuniary legatees, supported the same view.

Sir H. Jackson, Q.C., and *Jason Smith*, for Edward Hill, the tenant for life of one of the legacies under the testatrix's will, but who claimed a larger interest under the will of Hannah Hill: Our interest is, that Mrs. Hill's estate should be increased as much as possible; and our contention is that her estate is entitled to 4 per cent. from the testatrix's death to her own death upon the present value, on the 30th of May, 1867 (one year after the death), of the sum of £18,380 18s. 9d. found by the Chief Clerk to have been the amount actually received in respect of the reversionary interests; that is to say, a sum of about £15,660.

We rely upon the rule in *Wilkinson v. Duncan* (*), which was not intended to be, and was not, altered by *Brown v. Gellatly*, a decision which had nothing to do with the point.

Wilkinson v. Duncan was not cited in *Brown v. Gellatly*.

The principle was recognized by Vice-Chancellor James in *Potts v. Smith* (*), that in estimating the value at the testator's death of an annuity, regard must be had to the events which had happened up to the time of the valuation, and the learned judge said that if it were necessary he must hold that the new rule had superseded the old.

Kay, in reply, said he would not contest the point further.

BACON, V.C., held that the value of the reversion which fell in in 1871 was to be calculated at the end of a year from the date of the testatrix's death, on the assumption that it would fall in when it actually did; and that the tenant for life was to have £4 per cent. on that amount from the death.

The court also held that the charitable legacies did not abate; also that the sum due to Mrs. Hill's estate did not abate, inasmuch as it consisted of interest on a principal sum which had abated already, by reason of the insufficiency of the testatrix's estate. Minutes accordingly.

Solicitors: *Gray, Mounsey & Co.*; *James, Curtis & James*; *Farmer & Robins*.

(*) Law Rep., 2 Ch., 751.

(*) 23 Beav., 469.

(*) Law Rep., 8 Eq., 683.

[6 Chancery Division, 655.]

V.C.B., July 19, 20, 1877.

In re MITCHELL'S ESTATE.

MITCHELL V. MOBERLY.

[1876 M. 170.]

Mortmain Act—Railway Company—Debenture Mortgage—Assignment of Undertaking and Tolls—Charity—Interest in Land.

A debenture mortgage made by a railway company in the form given in Schedule C of the Companies Clauses Consolidation Act, 1845, does not give the debenture holder an interest in land within the Statute of Mortmain.

[6 Chancery Division, 671.]

V.C.B., April 18, 1877.

671]

*BENNETT V. HOULDSWORTH.

[1872 B. 230.]

Settlement and Will—Election.

A settlor, on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third, of all and singular his real and personal estate should be settled for the benefit of the daughter, her husband, and their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime, leaving a husband, who also died in the settlor's lifetime, and two infant children, who survived the settlor.

The settlor made a will, whereby, after directing payment of his debts, he disposed of personal chattels, gave a number of legacies, and, amongst others, a legacy of £4,500, and part of the residue of his estate, to his nephews and nieces, and his two infant great-grandchildren above mentioned, in equal shares:

Held, that the liability under the covenant was not a debt to be paid before the division of residue, and that the infants were bound to elect between the benefits under the settlement and under the will.

Chichester v. Coventry (1) distinguished.

FURTHER CONSIDERATION. By an indenture dated the 17th of April, 1833, being the settlement made prior to the 672] marriage of Edward Bennett and Elizabeth *Nicholson, James Nicholson, the father of the intended wife, covenanted with trustees that, immediately after the decease of him, James Nicholson, "all and singular the real and personal estate and assets whatsoever whereof he or any person or persons in trust for him shall be seised, possessed, or entitled in possession or expectancy or otherwise howsoever," should be divided into so many equal parts or shares as James Nicholson should at the time of his decease "leave children lawfully begotten or issue of such

(1) Law Rep., 2 H. L., 71.

children as shall have died in his lifetime, such issue being reckoned *per stirpes* only and not *per capita*," and that he would by deed or will give, devise, bequeath, settle and assure one of such equal parts or shares to such and the same uses and for such and the same trusts for the benefit of Edward Bennett and Elizabeth, his intended wife, and the issue of their marriage, if they or either or any of them should be living at the death of James Nicholson, as were thereinbefore limited, declared, and expressed, of and concerning a certain estate, hereditaments, and premises thereinbefore described, or as near thereto as the difference between real and personal estate, the deaths of parties, and other intervening accidents would admit. These trusts were for the benefit of Elizabeth Nicholson for her separate use, for life, then for Edward Bennett for life, and after the decease of the survivor, for all and every the children and child of the marriage in equal shares absolutely.

There were four children of the marriage, one of whom, Edward Powlett Bennett, died in the lifetime of his father, an infant.

On the 14th of December, 1851, Edward Bennett died leaving three of his children surviving, namely, Ada Victoria Bennett, Campbell Edward Bennett, and Harry Bennett. By his will, dated the 8th of January, 1850, Edward Bennett devised and bequeathed all his real and personal estate to his wife, "in perfect persuasion and confidence that she will use it in every respect for the support and maintenance of" their children; but in case she should die without making any will or appointment of the same, then he directed the same or the residuo thereof to be divided between such children as he might have at his decease, share and share alike.

On the 7th of February, 1852, administration was granted to *Elizabeth Bennett. The estate of Edward Bennett was insolvent, and had been administered in the Court of Chancery; the creditors being still unsatisfied. [673]

On the 30th of December, 1861, Ada Victoria Bennett, having married Roger Melladew, died, leaving two infant children, John and Jane Elizabeth Melladew.

On the 5th of June, 1862, Elizabeth Bennett, the widow, died, having married John Birch Melladew, who was still living. He had become the legal personal representative of Roger Melladew, who was his son.

Elizabeth Bennett made no bequest or appointment of the fund. In 1866 Campbell Edward Bennett was adjudicated a bankrupt.

On the 5th of August, 1871, James Nicholson, the settlor, died, having by his will, dated the 13th of April, 1870, appointed William Henry Houldsworth and Charles Lings trustees and executors. He thereby gave a legacy of £100 to Charles Lings; and to his daughter Sarah, wife of William Birch, his household goods and other specific chattels. He then gave and devised to his trustees all and singular his real leasehold and personal estates, property and effects, of what nature or kind soever and wheresoever situate, upon trust to sell and convert, and to stand possessed of the moneys upon trust to pay all expenses incident to the trusts of the will, and his "just debts," funeral and testamentary expenses; and the following legacies: to Sarah Birch £2,000 (reduced by codicil to £1,000); to William Birch £2,000 (revoked by codicil); to Harry Bennett £2,000; and several legacies to nephews and nieces of £200 each. He directed his trustees to stand possessed of £4,500 and the investments thereof upon trust for the use of his son John for life, and afterwards to be divided equally amongst testator's said nephews and nieces, and the two children of his late granddaughter, Ada Melladew, the said two children taking one share only between them. He further directed his trustees to stand possessed of £2,000 and the investments thereof upon trust to pay the income in and towards the maintenance, education, and advancement of the two children of Ada Melladew until twenty-one, and on their attaining that age, to divide the sum amongst them in equal shares; in the event of the death of either under twenty-one leaving issue, 674] such issue to take the parent's share; *with survivorship, in case of the death of one under twenty-one without leaving issue, to the other and her issue; and in case of the death of both under twenty-one without leaving issue, to fall into the residue. He then directed the residue to be invested in certain specified securities and the proceeds paid into "the proper hands" of Sarah Birch for life, for her separate use; and after her death the capital to be held for the benefit of her children in equal shares; with survivorship, in case of the death of any child before his or her share became payable or divisible and without leaving issue, to the others; and in default of children, then as to £3,000, part of the residue, in trust for William Birch absolutely; and as to the remainder upon trust for all testator's nephews and nieces and the two children of Ada Melladew in equal shares, and the issue of any who should be then dead, the issue taking the parents' share only.

The settlor and testator left surviving him at his decease

his son John, who had never married; his daughter Sarah Birch, who had no issue; and the above-named issue of his daughter Elizabeth Bennett, afterwards Melladew. Thus, the number of shares into which his property would be divisible under the settlement was three.

On the 6th of February, 1872, Harry Bennett received payment of the £2,000 legacy.

On the 19th of July, 1872, the bill was filed by Harry Bennett, on behalf of himself and all other the creditors of James Nicholson, deceased, against the trustees and executors of the will, alleging as follows:—

“The will of the said testator is not a performance of the said covenant . . . contained in the said indenture of settlement, and the said testator has not performed the said covenant, and the plaintiff is entitled to stand in the position of a creditor of the estate of the said testator for a large sum in respect of the share to which, by virtue of the said covenant and the operation of the trusts of the said indenture of settlement, he is entitled of the estate of the said testator.”

The bill prayed that the amount due to the plaintiff from the estate of the testator by virtue of his covenant in the settlement *of April, 1833, might be ascertained and [675 “allowed as a debt due from” the testator’s estate, and might be raised and paid to the plaintiff; also that the amounts due to the other persons from the testator’s estate by virtue of the said covenant might be similarly ascertained and allowed, and raised and paid; and, if necessary, for administration.

Since the institution of the suit, the plaintiff had become the legal personal representative of the surviving trustee of the settlement, also of his infant brother, Edward Powlett Bennett, and of his father, Edward Bennett.

The executors and trustees, by their answer filed on the 5th October, 1872, disputed the right of the plaintiff to stand as a creditor of the testator’s estate for any sum whatever, either by virtue of the covenant or otherwise. They submitted that the plaintiff, by accepting payment of the £2,000 legacy, had elected to take under the will, and so had precluded himself from enforcing the covenant against the testator’s estate.

On the 17th of November, 1874, a decree was made, whereby, after reciting that the plaintiff did not claim the legacy of £2,000 in addition to, but submitted to bring the amount into account as part of, his share under the settlement, accounts and inquiries were directed as in an administration suit.

1877

Bennett v. Houldsworth.

V.C.B.

The Chief Clerk, by his certificate, filed on the 1st of March, 1877, found, amongst other things, that the legacies given by the will amounted to £10,800; and that the said legacies had been paid, satisfied, and appropriated, and were allowed in the account of personal estate, "subject to any question of election respecting such of the legacies or shares of legacies in which the children of Ada Victoria Melladew are interested."

The cause now came on for further consideration.

Sir H. Jackson, Q.C., and *Edmund S. Ford*, for the plaintiff.

Ingle Joyce, for the defendants.

Kay, Q.C., and *Begg*, for Mr. and Mrs. Birch: The provisions as to residue under the will are absolutely inconsistent with the provisions of the settlement. The plaintiff has abandoned all claim under the will, and with regard to him [676] no question arises. But the children of Ada Victoria Melladew, who are great-grandchildren of the settlor and testator, claim one-fourth of a third of his estate under the covenant, and also to take under the will. But in this court no one can claim under one, and also under another wholly inconsistent, instrument. In *Chichester v. Coventry* (¹), which will be cited, there was no indication of any intention to put the parties to an election. The covenant there was to pay, not, as here, a share of uncertain amount, but a fixed sum of money. It was a specialty debt. The principle is, that if you come seeking an equity you must do equity. It may be argued that the two great-grandchildren do not take directly under the settlement, but only derivatively. Such an argument is disposed of by *Cooper v. Cooper* (²). The principle is, that a person cannot claim under a deed, and then under a will inconsistent with that deed.

Everitt, for other residuary legatees.

Hemming, Q.C., and *Whitley*, for the two infant children of Ada Victoria Melladew: The argument against us appears to be founded on the rule against double portions. But the court always looks narrowly to see whether there is the alleged inconsistency. The question is, whether by "residue" the testator did not mean the residue of his estate after the covenant had been satisfied. That was held to be the construction in *Chichester v. Coventry*. There the dispositions made by the will were so widely different from those of the settlement, that they were held to be indications that the devise was not meant to be a satisfaction of

(¹) Law Rep., 2 H. L., 71.

(²) Law Rep., 7 H. L., 53; 9 Eng. R., 39.

the covenant. Here we have a much greater difference between the two sets of dispositions than existed in *Chichester v. Coventry*.

In *Russell v. St. Aubyn* (¹), there was so much similarity that it was held a satisfaction must have been intended. This case is so much the reverse of *Russell v. St. Aubyn* that upon the reasoning of that judgment the result must be the other way.

It is said that *Chichester v. Coventry* is distinguishable, because there the covenant was to pay a fixed sum of money, and *hence the sum so covenanted to be paid must [677 be treated as a debt. But an uncertain sum the subject of a covenant is as much a debt as a fixed sum.

Cooper v. Cooper (¹) decided, not that every derivative interest may be the subject of the rule as to election, but only one sort of derivative interest. *Grissell v. Swinhoe* (²) is a case of an interest so derived as not to be the subject of election.

On either ground the children of the settlor's granddaughter are not put to their election.

De Gex, Q.C., and *Macnaghten*, for the creditors' assignees of Campbell Bennett.

Kay, in reply: The whole question is, has this testator by his will disposed of three-fourths of his estate, or of the whole? If he made his will, forgetting the covenant, it is a will inconsistent with that covenant, and if so, no one can claim under both instruments.

Is it possible to say that the will disposes of three-fourths of the estate designedly, omitting the other fourth? Does the testator say, I dispose of three-fourths of the estate? or does he say, I dispose of the whole, neglecting the covenant? Suppose the testator's debts had been larger than the value of his estate, can anybody say that the estate was already disposed of, so that creditors could not come in?

The only argument is, that the claimants are creditors. How can they claim as creditors? All they can have is a decree for specific performance of the trusts of the settlement. That is not a debt. According to the argument on behalf of these claimants, they would be entitled to one-twelfth of every article he possessed in the world.

A great-grandchild may be within the law of election. In *Cooper v. Cooper* it was next of kin who claimed, and were put to their election.

(¹) 2 Ch. D., 898; 16 Eng. R., 811. (²) Law Rep., 7 H. L., 53; 9 Eng. R., 39.

(³) Law Rep., 7 Eq., 291.

BACON, V.C.: The main question which has been argued [678] is, I think, not only *covered by authority, but is in itself plain enough, if there were no authority to guide the court.

In the year 1833, a father, upon the marriage of his daughter, contracts that he will, his property being divided into three parts, settle one of those parts, either by deed or by will, in favor of that daughter and the issue of the marriage. That is in the year 1833. What took place in the interval one does not know, and it is not necessary to inquire. But in the year 1870, when that same father comes to make his will, he makes a will the terms of which are, in my opinion, impossible to misunderstand. It is a disposition by him, which I must assume he thought he had a right to make, of the entirety of his estate and effects in the manner described in the will. There is not only no mention of the settlement which had been made, but there is no allusion to the objects of the settlement, or if it could be said in any way that there is any allusion to the objects of the settlement, that would be adverse to the contention which has been raised on the part of the grandchildren, for the legacies given to them are given in terms from which one would infer that they stood in need of provision. There is a present provision for their maintenance and education, and it gives them an ultimate interest, in some contingencies, in other parts of that entire estate of which he disposes. If it stood upon the will alone, I do not think any one reading it and attending to the facts of the case could have any doubt.

Then, it is said, the testator having in his will directed that his debts should be paid in the first instance, this contract entered into by him on the marriage of his daughter constituted a debt. In my opinion, it was in no sense a debt. It is impossible to call it a debt with any strictness or regularity. It is an obligation to do a certain thing, which, if it had been done specifically, would have been no payment of any debt, but would have been a handing over of one equal fourth part of all his money, lands, and property of whatever description he had. The argument on behalf of the grandchildren, therefore, in my opinion, is not in the least helped by calling it a debt.

Then it is said that the case of *Chichester v. Coventry* (1) is a case which entitles the grandchildren (I call them by [679] that name *in this case for the sake of distinctness) to claim the performance of this obligation, and also to have

(1) Law Rep., 2 H. L., 71.

the benefits under the will. Now nothing, in my opinion, can be more distinct, and nothing clearer than the reasons of the decision in *Chichester v. Coventry* (¹). In that case there was a debt called by its proper name—a debt, and the testator there, in contracting that debt, had provided for the settlement of the money constituting the debt in a particular way; and being, as appears by the case, a man of very large wealth, when he comes to make a division of his property between his only two children, he gives one-half of it to the lady upon whose marriage he contracted the debt of £10,000, and settles that in terms which he mentions there, giving the other half to the other of his only two children. There the decision was, that the debt must be paid first. There was no inconsistency. There was a difference between the provision in the settlement of the debt and the settlement of the moiety of his estate; but there was no inconsistency in the provisions. There was nothing to induce the court to believe for one moment that the testator had not clearly in his view the knowledge of the fact that he had contracted to pay £10,000; and, in addition to that, he paid £10,000 many times over.

In this case the settlement is, in my opinion, in very plain terms. It does entitle the parties under the settlement to have one equal fourth part of the whole of the testator's estate applied upon the terms of the settlement, but it is only upon the terms of the settlement. The representative of the trustees of the settlement, who asks by this suit to have the trusts of that deed carried into execution, does not ask for the payment of any debt, but asks that the fourth part may be ascertained, and that it may be paid to him in satisfaction of the obligation contained in the settlement. In my opinion, that is a claim which cannot be resisted. It does seem to have been resisted at the hearing. The decree proceeded upon the adoption of it, and the acknowledgment of the justice of that claim. The point about the double provision is incidentally mentioned in the decree. It is not mentioned in the way of decision, because then the trustee, the plaintiff, who was also entitled to a legacy of £2,000 apparently under the will, consenting *at once to give [680 that up, felt that he could not sustain any contention in favor of having that sum, and also the share to which he was entitled under the settlement.

[His Lordship, after deciding another point, viz., that the testator's representatives were not entitled to deduct from the share of Campbell Bennett, now in the hands of his

(¹) Law Rep., 2 H. L., 71.

assignee, the amount of certain simple contract debts due from Campbell Bennett to the estate, for advances made to Campbell Bennett by the testator in his lifetime, continued :]

All the rest seems to be pretty clear. I do not understand that there is any difficulty now that the Chief Clerk has made all the inquiries requisite. The estate is ascertained and capable of division.

The following are minutes of the decree :

Plaintiff to bring in the £2,000.

Declaration that infants are bound to elect.

Inquiry whether for their benefit to take under the will or under the settlement.

Declaration that whatever, after the election, may remain subject to the trusts of the settlement ought to be paid to the trustee of the settlement with interest from the death of the testator at 4 per cent.

Costs to be taxed both as between party and party and as between solicitor and client ; costs out of the estate as between party and party of all parties, including parties attending ; the difference between the solicitor and client costs and ordinary costs of the plaintiff as trustee, and of Mrs. Birch, to come out of his and her own fund respectively.

Proceedings as to the plaintiff to be stayed, and further conduct of the suit given to Mr. and Mrs. Birch.

Liberty to apply.

Solicitors : *Rowley, Page & Rowley ; J. E. Fox & Co.*, agents for Earle & Co., Manchester ; *Parker, Lee & Ockerby ; Burton, Yeates & Hart.*

See 22 Eng. Rep., 12 note.

Under the statute of Iowa, if the widow do not object to the will of her husband, and relinquish all rights conferred thereby, she is deemed to have accepted under it ; nor will her own will, published some years afterwards, be considered a declaration of her intention to renounce her rights under the will of her husband : *Kyne v. Kyne*, 48 Iowa, 21.

H. devised certain land to his sister, and, after providing for his widow, left his residuary estate to his nephews and nieces. The widow refused to take under the will, and elected instead to take her interest under the intestate law. Held, that the sister was entitled to have the assets marshalled, and a sum set apart sufficient to relieve the land devised to her from its burden of the widow's interest : *Gallagher's Appeal*, 87 Penn. St. R., 200.

Where dower is barred by a legal jointure, an election, under section 43 of the wills act, is not necessary to entitle the widow to take the provisions

made for her in her husband's will ; but where the bar is by an equitable jointure or settlement merely, *quære*.

The year within which the election under said section must be made begins to run from the date of the service of a citation, and where the widow, appearing in open court without service of a citation, declines to make her election, she does not thereby waive the issuing and service of a citation, or estop herself from denying that a citation had been issued and served.

Whether a widow can take the provisions made for her in the will of her husband, and also under an ante-nuptial contract whereby her right of dower is barred, depends on the intention of the testator.

Where, by ante-nuptial settlement, a sum of money is secured to the wife, to be paid after the husband's death, and, by a subsequent will, the husband directs all his just debts of every kind to be first paid, and makes provisions for the support of his wife during widowhood, with a declaration

that the intent and meaning of the testator was to give to his wife the provision made for her in his will, she may claim the provision in the will, and also that made for her in the settlement: *Bowen v. Bowen*, 34 Ohio St. Rep., 164.

G., by his will, directs that his estate shall be kept together for the support of his wife and children until his widow shall marry, or die, or until his youngest child comes to the age of twenty years. And he directs that a certain sum shall be paid to a child who shall marry, and thus cease to be supported out of the profits of the estate. The widow renounces the will.

Held, this does not authorize a division of the estate, but it is to be kept together until one of the contingencies mentioned in the will occurs.

After directing that his estate shall be kept together, as above stated, G. empowers his executor to sell, if he shall think it would be to the interest and benefit of his wife and children, any part of the estate "except the homestead known as Seguine, and the mills and appurtenances thereto at-

tached." And he directs an equal division of his estate among his five children. Three of the children were by a former wife, who had inherited one-third of Seguine. G. bought the other two-thirds, lived upon it, and, during the first wife's life, expended some \$9,000 in improvements upon it. In 1864, the Confederate government impressed the timber standing on 289 acres of Seguine, and G. having received payment for it, he, with that money and some of his own, bought two tracts of land which he owned at his death, and which passed under his will.

Held, the will does not make a case of election as to the one-third of Seguine; but the three children by the first wife are entitled to take that third by inheritance from their mother, and to share equally with the other two children in the estate of their father, G.

This will does make a case of election as to the one-third of the price of the timber taken from Seguine, and the said three children cannot claim that and take under the will: *Gregory v. Gates*, 30 Gratt. Rep., 83.

[6 Chancery Division, 686.]

V.C.H., Jan. 12, 1877.

**In re CAMPBELL'S POLICIES.*

[686

Marriage Settlement—Wife's after-acquired Property—Covenant to settle Property from particular Source—Determination of Coverture—Property acquired after.

A covenant to settle after-acquired property will, in the absence of indications of a contrary intention, be read as limited to the duration of the coverture, and this though the covenant relates only to property from a specified source.

By a deed-poll executed in contemplation of the marriage of Harriet Campbell, a minor (one of the three children of Colonel Henry Dundas Campbell and Anne Maria his wife), with Alexander Shank, and dated the 1st of April, 1847, Colonel Henry Dundas *Campbell, in exercise of a [687 power contained in his marriage settlement, appointed a one-third share of the moneys to be received under certain policies of assurance on his life to Harriet Campbell, subject to the life interest of her mother, Anne Maria Campbell, therein. By the marriage settlement of even date with the deed-poll, after reciting that on the treaty for the marriage it had been agreed that the appointed share "and also all the parts or shares and interest whatsoever to which the

said Harriet Campbell or the said Alexander Shank in her right at any future time or times should or might become entitled under or by virtue of the said settlement made upon the marriage of the said Henry Dundas Campbell and Anne Maria his wife" should be settled in manner thereafter mentioned, it was, in pursuance of the agreement and in consideration of the marriage, witnessed as follows:—

"It is hereby declared and agreed by and between the parties to these presents, and he the said Alexander Shank for himself, his heirs, executors, and administrators, doth hereby covenant with" (the trustees) "that if the said intended marriage shall take effect he the said Alexander Shank and all other necessary parties shall and will as soon as the case will admit, at the costs and charges of the said Alexander Shank, his heirs, executors, and administrators, by such assignments and assurances in the law as by" (the trustees) "shall be required, assign all that" (the appointed share) "and also all the parts or shares or interest whatsoever to which the said Harriet Campbell or the said Alexander Shank in her right at any time or times shall or may become entitled under or by virtue of the said settlement made upon the marriage of the said H. D. Campbell and Anne Maria his wife, unto, and make, do, and execute, or cause and procure to be made, done, and executed, all such acts, deeds, assignments, assurances, matters, and things which shall be necessary for vesting the interest in possession therein in" (the trustees) "upon the trusts hereinafter contained."

The settlement then declared that the trustees should hold the said third share of the policy moneys, and also "all other parts and shares and interest whatsoever to which the said Harriet Campbell or the said Alexander Shank in her right at any time or times shall or may become entitled by 688] virtue of the said settlement made upon *the marriage of the said Henry Dundas Campbell and Annie Maria his wife hereinbefore also agreed and covenanted to be assigned" when the same respectively should have been assigned in pursuance of the covenant, upon trust as soon as might be after the same should have become payable, to call in, receive, and invest the same, and to pay the annual produce to Alexander Shank, the husband, for life, and after his death to Harriet Campbell for life, and after the death of the survivor upon ordinary trusts in favor of their children.

This settlement was adopted by Mrs. Shank after she came of age. Mr. Alexander Shank died in 1866; his

widow, in March, 1872, married Captain Hale, and by a settlement executed upon that marriage, and comprising other property, it was, amongst other things, agreed and declared that all the real and personal property (if any) not thereby settled to which Mrs. Shank at the time of that marriage or she or Captain Hale in her right should be or become entitled, whether in possession or reversion, should, at the costs of the trust estate, be assured to and vested in the trustees thereof upon certain trusts thereby declared.

In April, 1872, Colonel Campbell died, having by his will, dated the 11th of March, 1869, at which time Mrs. Hale was the widow of Mr. Shank, after reciting his own settlement and his appointment to her of the one-third share of the policy moneys, appointed and bequeathed to her for her sole and separate use, the remaining two-thirds of the policy moneys, subject to the life interest of his wife Mrs. Campbell therein.

In May, 1876, Mrs. Campbell died, and the question having arisen whether the trustees of the Shank settlement or those of the Hale settlement were entitled to the two-thirds appointed and bequeathed by Colonel Campbell's will, the trustees of the Campbell settlement paid the amount representing those two-thirds into court under the Trustee Relief Act.

Dickinson, Q.C., and *Colt*, for the trustees of the Shank settlement: There are no words in the covenant contained in the Shank settlement to restrict its operation to the duration of the coverture, and the court will not introduce words for that purpose. It is not the ordinary case of a covenant to settle after-acquired *property of the wife, for the [689 source is specified from which the property is to come. The marriage contract embraced everything coming under the Campbell settlement either by appointment or in default, so that the time at which the wife became entitled to the property is of no moment, and the source from which she derives it is alone to be regarded. A strict construction of the language is the only one which will carry out the intention of the parties, and the trustees of the Shank settlement are accordingly entitled.

Robinson, Q.C., and *Worsley Knox*, for the trustees of the Hale settlement: It is now the settled rule that a covenant to settle the after-acquired property of the wife must, in the absence of expressions showing a contrary intention, be read as if the words "during the coverture" were inserted therein: *In re Edwards* (1); *Dickinson v. Dilwyn* (2);

(1) Law Rep., 9 Ch., 97; 8 Eng. R., 760.

(2) Law Rep., 8 Eq., 546.

Carter v. Carter ('). The reason for, and primary object of, such covenants is to prevent the wife's after-acquired property from falling under the sole control of the husband: *Dickinson v. Dilwyn*. And this being so, the circumstance that there is a reference to the source from which the after-acquired property is to come does not take the covenant out of the operation of the general rule. Moreover, this is not a covenant or agreement that all necessary parties shall settle, but the form of the covenant shows that the property to be assigned was property to the assignment of which the husband would be a necessary party; he was to concur in everything that was to be done, and all was to be done at his expense, so that the covenant could not be intended to operate in a case in which his concurrence would be impossible, or even unnecessary. In any case this property cannot be bound by the covenant, for it was appointed to the lady for her separate use, *Ramsden v. Smith* ('); and here, again, the frame of the settlement lends force to the contention, for the first life estate is given to the husband, so that if the property were bound and had fallen in during the coverture, and the lady had predeceased Mr. Shank, she would never have had any enjoyment of it at all, though it was given to her for her separate use.

690] **B. B. Rogers, W. W. Karlake, and G. Harris Lea*, for other parties.

Dickinson, in reply: The argument is, that property specifically settled is not to be so treated. *Dickinson v. Dilwyn* (') shows that there is a distinction between property coming from a specific source and after-acquired property generally, for the £100 which came under the father's will was held subject to the covenant. This is a covenant to the benefit of which the children of the Shank marriage, who are eight in number, are entitled; they have got one-third of this property, and why should they not have the other two-thirds for which their father contracted? As to the frame of the covenant, if Mr. Shank could assign he was to do so, if not, all other necessary parties were. All that was decided in *Ramsden v. Smith* was that where a man covenants to do an act the covenant only applies to property which he can affect.

HALL, V.C.: I am of opinion that the two-thirds of the policy moneys appointed and bequeathed by the will of Colonel Campbell are not comprised in the Shank settlement, but are comprised in the Hale settlement. The arguments which have been addressed to me in favor of

(') Law Rep., 8 Eq., 551. (') 2 Drew., 298. (') Law Rep., 8 Eq., 546.

construing a clause like this to include property coming to the lady after the determination of the coverture, are not sufficient to induce the court so to extend its operation. On the contrary, I think that such a construction would in all probability not carry out the intention of the parties. It might have the effect of rendering impossible any settlement upon the children of a second marriage, and of leaving them totally unprovided for. A settlement upon a first marriage having such operation would be in the highest degree improvident; for the lady might soon become a widow, and thus, if the covenant were held to extend over the whole period of her life, all her fortune might go to the single child of a first marriage, to the entire exclusion of numerous children of a subsequent marriage. Such general observations as have a bearing upon the case are therefore in favor of restricting *the operation of the covenant to the con- [69] tinuance of the coverture which occasioned the settlement. Then as to the authorities. It has been established by the Court of Appeal that a covenant to settle the after-acquired property of the wife must, in the absence of words showing a contrary intention, be read as if the words "during the coverture" had been inserted therein; and is there anything to take the present case out of the operation of that general rule? The only thing is that a specific property comprised in a certain settlement is referred to, and the covenant extends to a further share to which the wife might become entitled from the same source. I do not see, however, for what sound reason I can give to the covenant a construction at variance with the general rule, merely because a specific property is referred to in it. Upon true principles of construction, it should be equally limited, and a construction so limiting it derives additional force from the language of the clause itself, according to which all the acts agreed and covenanted to be done are to be done with the concurrence of the husband and at his cost. I give no opinion as to whether property given to a lady for her separate use would be bound by such a covenant, in cases where the words of the covenant are sufficiently large to embrace the wife as one of the parties to do the requisite acts, or where the agreement to do the acts is general, without specifying by whom the acts are to be done. In *Ramsden v. Smith* (1), property given to the lady for her separate use was held not to be included, because from the language of the covenant all the acts which were to be done were either acts to be done by the husband alone, or by those he had a right to

(1) 2 Drew., 998.

1877

Ex parte Winder.

V.C.H.

compel, or acts to the doing of which his concurrence was necessary.

In this case I hold that the two-third shares in question are not bound by the covenant contained in the Shank settlement, but are comprised in the Hale settlement, and must be dealt with accordingly.

Solicitors: *Combe & Wainwright; W. & A. R. Ford; Hardisty & Rhodes.*

[6 Chancery Division, 696.]

V.C.H., April 21, 1877.

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**Ex parte WINDER.*

Railway Company—Lands Clauses Consolidation Act, 1845, ss. 69, 75, 76, 77, 79—Taking of Land—Compulsory Powers—Trespasser—Title by Possession—Payment of Purchase-money into Court—Statute of Limitations.

A railway company agreed to purchase for £600 the fee simple of lands, of which W. was the true owner, from H., who was in possession of them. Afterwards finding that H. had only a possessory title of 19½ years, they paid the £600 into court to the account of "the party interested" therein, took possession, and executed a deed-poll under the 77th section of the Lands Clauses Consolidation Act, 1845, reciting their desire that the land should vest in them for all the estate of H., and purporting to vest in themselves the fee simple of the lands. No claim was made on behalf of W. either to the land or the purchase-money until after the expiration of twenty years from the time when H. had taken possession. Upon petition by persons claiming under H. for payment out to them of the £600 in court:

Held, as against the representative of W., that the petitioners were entitled to the £600, as being the money which the company had contracted to pay for the purchase of H.'s interest in the lands.

PETITION. In 1848 T. Hollingsworth entered into negotiations with W. C. Wright for the purchase of a piece of land in the parish of Prescott, in Lancashire, called Sweet Tooth Field, which contained 1A. 0R. 26P., and adjoined certain property which Hollingsworth had shortly before bought from Wright. These negotiations fell through. In December, 1849, Wright was arrested and committed to prison for debt, and by an order of the Court for the Relief of Insolvent Debtors made on the 29th of January, 1850, all his real and personal estate became vested in Samuel Sturgis, the provisional assignee of the estates and effects of insolvent debtors.

In the same year (1850) Hollingsworth took possession of the above mentioned piece of land, which was of a barren nature and untenanted, and he continued in uninterrupted possession of it for 19½ years, until November, 1869.

On the 21st of January, 1869, the London and North Western Railway Company, requiring this piece of land for

the purposes of their undertaking, entered into an agreement with Hollingsworth to purchase from him the fee simple of it for the sum of £600. As Hollingsworth was, however, unable to make out his title, the company, on the 18th of July, paid the £600 into court under the Lands Clauses Consolidation Act, 1845, to the account of "the party interested in a certain piece of land situate," &c., "and now in the occupation of Thomas Hollingsworth." In November, 1869, the company took possession of the land; and on the 14th of January, 1870, they executed a deed-poll under the 77th section of the Lands Clauses Consolidation Act, 1845. This deed recited that the company, requiring the land, had made inquiries as to the person in possession, and had ascertained that Hollingsworth then was and for some time past had been in receipt of the rents and profits; it then recited the agreement with him of the 21st of January, 1869; that he had failed to make out a title to the fee simple; that the company had accordingly paid the £600 into court under the act to the account aforesaid, and that the company were desirous that the land in question "should vest absolutely in them for all the estate and interest of the said T. Hollingsworth therein"; and the deed then declared in the usual way that the land in question was the land in respect of which the £600 had been paid in, and that upon execution of those presents the same land should vest in them in fee simple.

Hollingsworth had, in 1866, entered into an agreement to sell half his interest in this piece of land to a Mr. Greenough; and in 1871 two petitions were presented, one by Hollingsworth and the other by Greenough, for the payment out of the £600 in court. *Both these petitions were, how- [698
ever, dismissed without costs, owing to disputes as to the validity of Greenough's agreement and the absence of evidence as to the interest of Wright.

In November, 1875, Hollingsworth died, having by his will constituted G. T. Winder his universal legatee and executor; and Winder, having admitted the interest of Greenough to a moiety of Hollingsworth's interest in the piece of land, now presented his petition for the payment out of the £600 in court to himself and Greenough in equal moieties. This petition was served upon the railway company, upon Greenough, and upon Mr. Duncan Stewart, the provisional and official assignee and receiver, in whom the estates formerly vested in Mr. Samuel Sturgis (since deceased) were vested by the Bankruptcy Repeal and Insolvent Court Act, 1869.

It appeared that Wright had left England many years ago, and had not been since heard of, and that no claim by him or his assignees had ever been made, either to the land or the money, until this petition was presented.

Dickinson, Q.C., and Bury, for the petitioner Winder: At the time the company took this land and paid the purchase-money into court Hollingsworth had been in possession for 19½ years, and in another six months his title, by the operation of the Statute of Limitations, would have become good against all the world. During the ensuing six months the rightful owner might have claimed the land or the money, but he did neither, nor did he make any claim at all for several years afterwards. Meanwhile Hollingsworth's title became absolute, for the payment in under an act passed for purposes of general public benefit cannot be held to have stopped the operation of the Statute of Limitations, so as, in effect, to deprive a man of property which, but for its being required by the railway company, would have been absolutely his in six months. Under the Lands Clauses Consolidation Act, 1845, s. 79, the party in possession is to be deemed to be the owner, and the company dealt with Hollingsworth as such. The payment in could not affect his title, for the purchase-money paid in was only the equivalent of the land in respect of which it was paid [699] in; and it has been decided that proceedings *under the Lands Clauses Consolidation Act are not to have the effect of disturbing any one in his enjoyment of the land or its equivalent; and that the interest of the party in possession can only be defeated by legal process: *In re Perry's Estate* (¹); *In re St. Pancras Burial Ground* (²); *Ex parte Webster* (before Vice-Chancellor Wood, June 23, 1866). The interest of a trespasser is descendible, and the true owner alone can put an end to it: *Asher v. Whitlock* (³). The petitioner is accordingly entitled to one-half of the fund in court.

Hastings, Q.C., and Hunter, for the executors of Greenough: The title of the assignee in insolvency of Wright accrued in 1850; he made no claim for more than twenty years, and his right became absolutely barred in 1870 under sect. 2 of the Statute of Limitations; he could therefore maintain no action of ejectment in respect of this land, and this shows that he has no title to the purchase-money. He could not now recover if it had been paid to Hollingsworth instead of into court.

(¹) 1 Jur. (N.S.), 917.

(²) Law Rep., 3 Eq., 173.

(³) Law Rep., 1 Q. B., 1.

Eddis, Q.C., and *A. G. Langley*, for Stewart, the assignee of Wright: This money was paid in to the account of the party interested because Hollingsworth had failed to make out a title. At the time it was so paid in Hollingsworth was not the true owner and Wright's assignee was. Hollingsworth had only an incomplete possessory title; the possession of the court must have the effect of keeping the money in the same position in which it was when it was paid in, and so it enures for the benefit of the true owner and not of the wrongdoer. There is no case in which an incomplete possessory title by a trespasser on land has been subsequently perfected in his favor by the possession of the court of the purchase-money; and the true owner at the time the money was paid must be held entitled to it. The payment in put an end to the running of time under the statute, and it is perfectly competent for the court now to declare that the true owner is entitled to the estate, or to the money representing the estate, which is in its own possession: **Dixon v. Gayfere* (¹); *Ex parte Freeman of* [700 *Sunderland* (²); *Brandon v. Brandon* (³).

Speed, for the company: In any case, the railway company, who have had to pay their own costs of the two previous petitions which have been dismissed without costs in this matter, ought to have their costs on this petition.

Bury, in reply.

HALL, V.C.: The question in this case is, I believe, an entirely new one. It required argument, and it has been well argued. It required consideration, and I have endeavored to give it consideration. It is a question arising upon the provisions of the Lands Clauses Act with reference to making titles to railway companies and paying money into court, but as those provisions have from time to time in the course of my experience been very much considered by me, I do not think it necessary to defer giving my judgment upon the case.

As a reasonable foundation for dealing with the case, we must, I think, start with this principle, that as far as we can, in applying these sections, we must not let the compulsory taking of the land by the company do injustice to any person who may be interested in the property which the company is authorized to take.

In this case the party who claims to have the fund paid out had acquired a title by possession of this property for nearly the time which would have operated as a bar to a claim by anybody else. Being in possession, the company

(¹) 17 Beav., 421.

(²) 1 Drew., 184.

(³) 2 Dr. & Sm., 805.

negotiate with him for the purpose of taken the land ; they treat him as being in possession, and he assumes himself to be a person who can make a title to the property. A contract is entered into based upon the assumption of his being the owner and capable of making a title to the fee simple. 701] Nobody could doubt for a moment that, if this *act of Parliament had not passed, he had a most valuable right and interest which could have been sold in the market, although he had not yet the full statutory title.

The argument which has been addressed to me involves this, that because he had not, at the moment the company took possession, got a complete title by reason of the period of twenty years not having then expired, the effect of the act of Parliament was summarily to deprive him of that which certainly was his property subject to the contingency of the real owner turning up and making a claim within half a year from the period when the company intervened and took the property. To give to the act such an effect and operation would, to my mind, be putting a very unreasonable construction upon it. Supposing that the railway company, instead of paying the money into court, had paid it to the claimant, there was nothing to prevent the real owner coming forward and claiming as against the company to be paid over again. There was nothing, if his contention now before me is right, to prevent him coming to the court to claim this money within twenty years, the period when the title would have been complete. He took no such course, and he left the money where it was. The money was paid in under the contract entered into with the person in possession, without the form being gone through of ascertaining, in the manner pointed out by the act, the price to be paid in the case of the owner being absent or not being capable of being found. It is undoubted that the company in this case might, if they had thought fit, instead of proceeding upon the contract, have had the price ascertained through the medium of surveyors to be appointed under the provisions of the act of Parliament. They did not, however, do so, but, acting upon the contract, they paid in the money into this particular account, and it seems to me that this course was not, under the circumstances, within the act at all, except only, possibly, to this extent, that by so paying in the money and executing the deed-poll the company might get vested in them the whole of the interest of the person with whom they had contracted ; but they would acquire the interest of nobody else. And they would thereby acquire the interest of the person with whom they had contracted by

virtually and substantially recognizing his interest in the property. *The whole money, therefore, must be [702 taken as representing that interest and nothing else, except, possibly, that if it had turned out after the transaction that there was some person interested in this property who had a charge upon it which was undisclosed, such as an outstanding right to dower, or some similar interest, the payment in might have enured for the benefit of such person; and I make that observation because that seems to have been the view taken of this section by Vice-Chancellor Wood in *Douglass v. London and North Western Railway Company* (') (a case which has not been referred to in the argument), where the Vice-Chancellor considered at some length the effect and operation of the 76th section and of the deed-poll. That was a somewhat curious case, in which a person who had contracted to give a sixty years' title, but could only prove a possessory title for some thirty or forty years, filed a bill for specific performance of the contract (which he could not have because his contract was to give sixty years' title), or in default to compel the railway company to pay in the money under the 76th section; and it was considered that he could not have that, and the Vice-Chancellor seems to have thought that all that the company would get by paying in under that section and executing a deed-poll, would be the interest of the person with whom they contracted and nothing more. In this case I think that, although the money was irregularly paid in so far as regards the rights and interest of the rightful owner, and with reference to whom no application was made to the court, the payment was in effect one under the act, and in respect of the contract which had been entered into; and such being the effect of the payment, and the deed-poll having the effect of vesting the interest of the contracting party in the company, it would be a strange thing if they or anybody else could turn round and say afterwards that the contracting party was to have nothing at all. That, however, is the argument. The argument is, that inasmuch as the time had not elapsed to give a title at the moment the money was paid in, it was in substance and in fact paid in so as from that moment to belong to a person who was out of possession, and who never came forward to make any claim either in respect of the land or the money for years afterwards.

*As I have said, the position of things is this: The [703 title not having been asserted on the part of the rightful owner (of course this will not prejudice any claim which may

(') 3 K. & J., 178-182.

be made to the land itself as against the railway company), the railway company having taken possession and put themselves into the shoes of the person with whom they had contracted, and entitled themselves by the act as against him, they did that which otherwise they unquestionably could not have done, because they could have been stopped at once in taking possession if they had attempted to do so without going through the forms prescribed by the statute, of paying the price and giving the bond, and so on. Under these circumstances it appears to me that the money so paid must be taken to have been paid in as the price agreed upon and the purchase-money payable to the person with whom the contract was entered into; subject only to his title proving in the event to be a defective title, either by reason of his having a right to proceed against the railway company for the land itself (which right apparently is now gone) or in respect of some such outstanding interest as that which I have referred to, and which was also referred to by Vice-Chancellor Wood in *Douglass v. London and Northwestern Railway Company*. In that case Vice-Chancellor Wood, in observing upon the 79th section, says ⁽¹⁾: "That assumes that the purchase-money has been already deposited in the bank, pursuant to the provisions of the 76th section;—that this stage has been already reached; and all that it provides is this, that where the purchase-money has been so deposited by the promoters of an undertaking—whether by reason of their not being able to find the true owner of the lands, or by reason of the existence of some outstanding estate or interest affecting the lands in the manner I have described, and making it necessary for them to have recourse to the provisions of the 76th section,—there, until the contrary is shown, the possession shall not be interfered with, but the person in possession shall be deemed to be the owner until the contrary is shown, and shall continue to enjoy the income of the property." That is, having ceased to be in actual possession, he is still to be considered in possession for the purpose of the continuance of the enjoyment of the income as it was enjoyed previously to possession being handed over to the [704] *company. That right of enjoyment of the income is, according to the view of Vice-Chancellor Wood, to continue until the contrary is shown, and in this case the contrary has never been shown at all; certainly it has never been shown within the time which would entitle the person so showing a title to assert such title. Again, in

(¹) 3 K. & J., 183.

an earlier part of his judgment, after construing the word "owner," the Vice-Chancellor says ('): "Now, suppose the land in the hands of such an owner to be subject to dower, or to a rent-charge by way of jointure, or to any other independent estate or interest outstanding in a third party who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title; in such a case the court, as in *Esdaile v. Stephenson* (*), would consider the objection to be one, not of conveyance, but of title, and the certificate would be against the title, because the 'owner' would have no control over the person in whom the supposed estate or interest is outstanding. To such a case, therefore, the 76th section is directly applicable."

That is the sort of case which, according to my idea, is meant to be provided for by this act. He goes on to say: "The 'owner' contracts to sell the lands to the promoters of the undertaking, and, being seised of the lands, he was competent so to contract; but when the promoters apply to him for his title, he fails to make out a title to their satisfaction by reason of the estate or interest of the dowress, jointress, or other third party having such outstanding estate or interest in the land as I have supposed. In such a case the 76th section comes in to their aid; the party seised is enabled to sell, the promoters of the company are empowered to deposit the purchase-money to his credit, and to the credit of the dowress, jointress or other third party, and by so doing they obtain a clear title in respect of all their estates and interest. The dowress, jointress, or other party claiming an outstanding estate or interest in the land could not have prevented the sale, but their estates and interests would have been obstacles in the way of the promoters, and from those obstacles the promoters are relieved by depositing the money under the 76th section." Then, further on, the Vice-Chancellor says this: "If the object, *therefore, of the company be only to obtain a clear [705 title against Mr. Wartnaby, I have no doubt their object will be perfectly attained by depositing the purchase-money in the bank under the 76th section. But whether the plaintiff has a right to insist on the money being so deposited, and on the company accepting that title, is a different question."

Now that case, although of course I do not refer to it all as being the case now before the court, does contain observations which have an important bearing upon the operation and effect of the 76th section, as to what can be done under

(') 3 K. & J., 181.

(*) 6 Madd., 366.

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it, and what is the operation of the deed-poll which is executed under it. And as none of the machinery of the act for ascertaining the amount either by surveyors or (if it could be done in such a state of things) by means of a jury, was resorted to in this case, it would rather seem that the effect of the deed-poll would only be to vest the actual interest of the party with whom the contract was entered into. Under these circumstances, it left the real owner, as it seems to me, at liberty to take proceedings by ejectment or action against the company for having taken his property without having gone through the forms of the act of Parliament. It is clear that he did not adopt the transaction of paying in for his benefit within twenty years, because, if there was a person really in existence at that time who could have made a claim, no claim was made.

I cannot hold, therefore, under the circumstances, that the person who had the real title could have taken, and I cannot hold him to be the party entitled to this money or to any interest in it; and this claim being out of the way, the only other alternative is that the money belongs to the person with whom the contract was made. Therefore the result is that the money must be paid out to the two parties as arranged between them. The costs must be taxed, and as two petitions in the matter have already been dismissed without costs, and the company have had to pay their own, I think they have borne enough costs, and I shall not order them to pay any costs of this petition.

Solicitors: *Milne, Riddle & Mellor*, agents for *Nicholls, Hinde & Co.*, Altrincham; *Peckham, Maitland & Peckham*; *A. S. Twyford*; *R. F. Roberts*.

[6 Chancery Division, 706.]

V.C.H., May 1, 1877.

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*ISAAC V. WALL.

[1875 I. 95.]

Devise of Freeholds, Copyholds, and Leaseholds—Trust to renew Leaseholds for Lives—Tenant for Life and Remainderman—Tenant for Life a Trustee—Purchase of Leaseholds for Lives and for Years—Purchase-money charged upon the Estates—Rights of Legal Personal Representative and Tenant in Tail.

A testator vested his freeholds, copyholds, and leaseholds for lives or years determinable upon lives, in trustees in trust for his son, who was one of the trustees, for life, with remainder to his eldest son in tail. There was a trust to renew leaseholds for lives, but not for years. The tenant for life purchased the reversion in fee of a lease for lives, part of the settled estates (his own life being one), and the fee was conveyed to himself and co-trustee upon the trusts of the will, no intention being

declared that the purchase-money was to enure for the benefit of those entitled under the will:

Held, that the estate of the tenant for life was entitled to the purchase-money, with interest from his death.

A tenant for life and sole trustee of settled estates, by will, purchased reversions in fee of leases for lives (his own life being one) and for years, parts of the settled estates, and the estates were conveyed, as to the reversion of the lease for lives, to him upon the trusts of the will; as to one of the reversions of the leases for years to him absolutely; and as to the other reversion of the leases for years to him upon the trusts of the will. He died while the leases for years would have been running out, and without having declared any intention that the purchase-moneys were to enure for the benefit of those entitled under the will. The first tenant in tail died in the tenant for life's lifetime intestate, leaving a widow, and a son heir in tail:

Held, that as to all the reversions purchased, the estate of the tenant for life was entitled to be repaid the purchase-moneys; that as regarded the legal personal representative of the first tenant in tail, both the estates of which there had been leases for years must be treated as being subject to those leases for the benefit of his first tenant in tail's estate; that as to the estate conveyed to the tenant for life absolutely, it belonged to the legal personal representative of the first tenant in tail; and that as to the other estate conveyed to him upon the trusts of the will, she was entitled to a leasehold interest of the same extent as the term would have conferred.

THE plaintiffs in this case were the trustees (appointed in January, 1875) of the will of William Wall, and they in October, 1875, filed a bill, praying that the trusts of the will, which remained to be performed, might be carried out under the direction of the court; and for consequential directions.

*William Wall, who died in October, 1844, by his [707 will, dated in July, 1844, after directing that his debts, legacies, funeral and testamentary expenses, should be paid out of his personal estate, and after making pecuniary bequests and specific devises, and provision for his wife (who died in March, 1862) for her life, devised all other his real estate unto William Ellis Wall, his son (but hereinafter called the father), and Edward Jones Williams, and their heirs, to the use that they should permit his wife, and her assigns during her life, to receive out of the rents a certain annuity; and, further, that they and the survivor of them, and the heirs of such survivor, should stand seised of all his real estate and premises to the use of William Ellis Wall (the father), and his assigns for life, without impeachment of waste, with remainder to the use of William Ellis Wall (the father) and E. J. Williams, and their heirs, during the life of William Ellis Wall (the father), to preserve contingent remainders, remainder to the use of the first and other sons of William Ellis Wall (the father) in tail, and in default of sons to the use of his daughters, as in the will mentioned, with remainder to his own daughter and her issue in strict settlement. The testator devised and bequeathed all his copyhold and leasehold estates, whether for lives or for years determina-

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ble upon lives, to William Ellis Wall (the father) and E. J. Williams, and their heirs, executors, administrators, and assigns upon trust for the same persons and subject to the same limitations as were declared concerning his real estates, or as near thereto as the rules of law and equity would admit, and he then disposed of his furniture, and charged a sum of £18,000 on his real estate, in case his personal estate should be insufficient, in favor of his daughter and her children, and he then directed his trustees to invest his residuary personal estate in the purchase of freehold, copyhold, or leasehold hereditaments; and to settle them to the same uses, and after declaring that the provisions of his will in favor of his wife and children were to be accepted by them in lieu of the provisions made in his marriage settlement, and giving certain powers of jointuring, charging portions, and leasing, he gave directions which in the view of the court were in effect for his trustees, out of the rents of his estates generally, to keep the buildings in good repair and to insure the same; and from time to time, when and as 708] occasion should *require to renew the leases for lives upon which all or any of his leasehold estates were or should be holden, and also to procure admissions to be made and taken of his copyhold estates, and in case the rents of his estates generally should not be sufficient for such purposes, he directed that his trustees should raise by mortgage or sale of his estates so much money as should be sufficient with the rents to answer such purposes. The will contained powers of sale and exchange, investment, and settlement to the same uses. By a codicil, dated in May, 1845, the testator made a different disposition in favor of his wife.

The testator left, in addition to his son, William Ellis Wall (the father), one daughter him surviving. He died possessed of personalty and entitled to estates consisting of freehold, copyhold of inheritance and for lives, and leasehold for lives and for years. The greater portion of the leasehold was held under ecclesiastical corporations.

The debts, funeral and testamentary expenses, and the legacies, were satisfied, and the sum of £18,000 was appropriated out of the personal estate, and in 1847 and 1848 personal estate amounting to £19,650 was invested by the trustees in the purchase of hereditaments, freehold, copyhold of inheritance, and leaseholds for lives and for years. The residue of the personalty was of large amount. The questions which now arose were in reference to the following purchases of reversions.

In December, 1858, William Ellis Wall (the father) and E. J. Williams purchased for the sum of £110, by way of enfranchisement, the reversion in fee of property (hereinafter called No. 1), which the testator held under leases, which had been granted by the Bishop of Worcester, by way of renewal to William Ellis Wall (the father) and E. J. Williams, their heirs and assigns, for the lives of certain persons (of whom William Ellis Wall (the father) was one). The conveyance was made to William Ellis Wall (the father) and E. J. Williams, and their heirs, to the uses declared in the will of William Wall.

The portion of the lands purchased in 1847 and 1848 with the £19,650, which was copyhold of inheritance, was in 1863 enfranchised subject to the payment of an annual rent charge of £14. When these lands were purchased they were surrendered unto the *use of E. J. Williams and his [709 heirs, and he alone was admitted. In January, 1867, these lands (hereinafter called No. 2) were released from the rent-charge by payment of £350 (purchase-money), and £11 0s. 10d. expenses. This enfranchisement was effected compulsorily by the lord of the manor.

In 1866 William Ellis Wall (the father) purchased for the sum of £321, by way of enfranchisement, the reversion in fee of property (hereinafter called No. 3), part of the estate of William Wall, which was held under a lease granted, by way of renewal, by the Bishop of Hereford, to William Ellis Wall (the father), his heirs and assigns, for the lives of three persons (of whom William Ellis Wall (the father) was one), and the conveyance was unto the use of William Ellis Wall (the father) upon the trusts declared in the will of William Wall.

William Ellis Wall (the father) also, in 1866, purchased, by way of enfranchisement, for the sum of £33 2s., the reversion in fee of leasehold property (hereinafter called No. 4), part of the estate of William Wall, held under a lease for forty-one years from the 25th of March, 1857, granted by the corporation of Worcester by way of renewal to William Ellis Wall (the father) and E. J. Williams, their heirs, executors, administrators, and assigns, and it was granted unto the use of William Ellis Wall (the father), his heirs and assigns. There was no evidence to show that this was not a conveyance to William Ellis Wall (the father) for his own benefit.

In 1867 William Ellis Wall (the father) purchased, by way of enfranchisement, for the sum of £1,720, the reversion in fee of leasehold property (hereinafter called No. 5),

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part of the estate of William Wall, held under a lease, which had been granted by the Dean and Chapter of Hereford unto William Ellis Wall (the father) and E. J. Williams, their executors, administrators, and assigns, for a term of twenty-one years from the 5th of May, 1859, and it was granted unto the use of William Ellis Wall (the father), his heirs and assigns, upon the trusts declared in the will of William Wall.

In 1868 William Ellis Wall (the father) purchased for the sum of £4,140, by way of enfranchisement, the reversion in fee of copyholds (hereinafter called No. 6), part of the estate of William Wall, held under grants for lives in possession 710] and reversion. The *copyholds at the time of the enfranchisement belonged absolutely to William Ellis Wall, the eldest son of William Ellis Wall (the father), subject to the life interest of the latter.

By the desire of William Ellis Wall (the father) and William Ellis Wall (the son), this property was conveyed unto William Ellis Wall (the father) and his heirs, upon the trusts of the will of William Wall. The purchase-money was paid into the Bank of England. These copyholds could not by custom be entailed.

The purchase-moneys for these six estates, amounting in the aggregate to £6,674 2s., and the sums paid for expenses, amounting in the aggregate to £276 1s. 1d., were paid by William Ellis Wall (the father) out of his own moneys, and no part had been paid to him or to his representatives.

William Ellis Wall (the father), who died on the 1st of May, 1874, by his will, dated the 12th of December, 1871, appointed four trustees and executors (of whom his wife, Fanny Eliza Wall, was one), and in exercise of the power in the will of William Wall, appointed to his wife during her life a rent-charge of £500 issuing out of lands devised by the will of William Wall, and devised all the lands and hereditaments of which he should be seised or entitled (excepting certain hereditaments, and not being the hereditaments subject to the trusts of the will of William Wall), to the use of his wife, for life, with remainder to the use of his grandson, William Ellis Wall, and the heirs male of his body, with remainders over. His will contained a power to the trustees to sell or exchange the devised hereditaments of which he was owner after the death of his wife, during the minority of his grandson, with the usual provisions as to investment of the proceeds.

The widow of William Ellis Wall (the father) died on the 20th of April, 1875.

William Ellis Wall (the father) had two sons, William Ellis Wall (the son) and Edward William Wall.

William Ellis Wall (the son) died in July, 1871, intestate. Letters of administration of his personal estate were granted to his widow, Sarah Wall, a defendant.

William Ellis Wall (the son) had two sons, of whom William Ellis Wall (the grandson), a defendant, was one, an infant and tenant in tail in possession.

*In November, 1859, Edward William Wall was [711 appointed a trustee, in the place of E. J. Williams, of the will of William Wall. He died in June, 1865, leaving William Ellis Wall (the father) the sole trustee of the will of William Wall.

William Ellis Wall (the father), who had paid out of his own moneys the before-mentioned aggregate sums of £8,674 2s. and £276 1s. 1d., did not make any declaration by deed, writing, or otherwise, that he intended to give up and merge the moneys so expended for the benefit of the persons interested in remainder in the residuary estate of William Wall; but that, on the contrary, he expressed a desire or intention to charge the same on the estates in his favor. It was stated that the purchase of the reversions was very advantageous, and even essential for the interest of all persons concerned in the residuary estates. There was very little evidence in the case. The principal was an affidavit of a gentleman who was formerly solicitor and agent of the tenant for life.

The defendants, the executors of William Ellis Wall (the father), having claimed to be paid the moneys so expended, with interest from his death, and the defendant William Ellis Wall (the grandson) having claimed to be equitably entitled to the enfranchised estates free from the rent-charges, as tenant in tail, and the defendant Sarah Wall having claimed to be interested in the estates No. 4 and No. 5, this suit for administration became necessary. The defendants, the executors of William Ellis Wall (the father), contended that though the power in the will of William Wall for raising money for renewals was not applicable for raising the moneys paid for the purchase of the reversions by way of enfranchisement, yet that he was authorized to raise money for the purchase of such of the reversions as were expectant on grants or leases by ecclesiastical corporations by the 23 & 24 Vict. c. 124, ss. 35, 36, and that if he died without having properly exercised his power in that behalf, his estate ought not to be prejudiced by reason of that; and also that if the prices and expenses were not recouped, the reversions purchased ought to form part of his estate.

It was stated that the legitimacy of William Ellis Wall's (the son's) two sons having been disputed, an application was 712] made to the *court to establish it, and on the 14th of July, 1874, a declaration was made by the Judge Ordinary to that effect. On a petition of appeal, presented on the 18th of February, 1875, the House of Lords, on the 16th of March, 1876, affirmed the decree and dismissed the petition.

Dickinson, Q.C., and Langworthy, for the plaintiffs, the trustees of the will of W. Wall: This is a case where a tenant for life (deceased), being at the same time a trustee of the will, purchased reversions of leaseholds for lives, and for years, and enfranchised copyholds. The legal personal representative of the tenant for life claims to have the moneys which he expended paid to his personal estate. The widow of the first tenant in tail also makes a claim to some portion of the estates, and the tenant in tail contends that the estates were purchased for the benefit of those entitled under the will. The result of the evidence shows that the tenant for life, neither at the time of the purchases nor subsequently, expressed any intention either one way or the other as to his claims—whether he made them for the benefit of those in remainder or for his own benefit; whether he intended that he should be repaid, or whether he would claim the further interests which were so acquired—and therefore the trustees have been obliged to ask the court what course they ought to pursue. The power in the will to renew does not, it is submitted, apply to leaseholds for years, but only to those for lives.

Cozens-Hardy, for the defendant William Ellis Wall (the grandson), tenant in tail: The estate (No. 1) enfranchised by William Ellis Wall (the father), and conveyed to the use of himself and E. J. Williams upon the trusts declared in the will under which William Ellis Wall (the father) was tenant for life, with remainder to his son in tail, now belongs to William Ellis Wall (the grandson) under the limitations in the will. The property was enfranchised, and freed from any charge by the tenant for life. There was, it is submitted, a renunciation of any right which William Ellis Wall (the father) may have had. The purchase-money is not now a 713] *charge on the property. It is not a case of a tenant for life paying off a charge which was upon the estate, but it is one of a simple voluntary purchase, and there is no resulting trust for the purchaser. The presumption is that he intended to benefit the estate. Indeed the evidence shows that he, during the life of William Ellis Wall (the son), did not express any intention to charge any of the various sums which he had

paid in respect of the enfranchisements upon the estates for his own benefit. It may be contended that as after William Ellis Wall (the son's) death drafts were, upon his instructions, in 1872, prepared, under the provisions of the statutes 23 & 24 Vict. c. 124, ss. 35, 36, and 23 & 24 Vict. c. 145, ss. 8, 9, there was the idea of obtaining the benefit of the expenditure for his own estate; but as in May, 1874, when he died, those drafts which had been retained by him had not been executed, there was no such intention manifested as would induce the court to act upon it. At all events, it is submitted that there was no such intention on his part, either in 1858 or when he made the subsequent enfranchisements, to charge the several sums upon the purchased estates. It is a case of a tenant for life desiring to improve the estate for the benefit of his descendants. As to the estates No. 4 and No. 5, in which the widow of William Ellis Wall (the son) claims an interest, the court will not, it is submitted, carve out imaginary new leasehold estates, and give the benefit of the rents and profits to her as his legal personal representative, but, as those estates, like the others, were purchased by William Ellis Wall (the father) in William Ellis Wall (the son's) lifetime, declare that such purchases were made subject to the devise of the real estates in the will of William Wall, and that they all go according to the limitations in that will, and that therefore the defendant William Ellis Wall (the grandson) is now entitled as tenant in tail.

Beaumont, for the defendant, the widow of William Ellis Wall (the son): As to the claim of the trustees of William Ellis Wall (the father), the administratrix of William Ellis Wall (the son) contests it on the same grounds as those urged on the part of William Ellis Wall (the grandson). As to any charge under the statute 23 & 24 Vict. c. 124, *it could only be created by some express act and at [714 the time of the enfranchisement. That is clear, looking at the words of sect. 35. Moreover, William Ellis Wall (the father) could not make any such claim or charge, for he was himself chargeable with the duty and expense of renewing the leases under the terms of the will of W. Wall, and also as to the duty of, at all events, under the provisions of the statute 23 & 24 Vict. c. 145, s. 8. That is so even where the leases are only renewable by usage, and even in the case of a mere tenant for life: *Lord Montford v. Lord Cadogan* (*); *Earl of Shaftesbury v. Duke of Marlborough* (*). But in this case he had, under the terms of the will, the express

(*) 19 Ves., 634.

(*) 2 My. & K., 111.

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duty as trustee to renew at his own expense as tenant for life—i.e., to provide for the renewals out of the rents and profits. Though the language of the clause as to this is that it should “be lawful,” that, in such a case, is an obligatory trust and not a discretionary power: *Lord Milsintown v. Earl of Mulgrave* (').

It is true that here there have been no renewals, but purchases of the reversions in fee, and that might perhaps have given rise, under other circumstances, to a claim for some portion of the outlay. But a trustee who is bound to procure renewals at his own expense cannot get rid of that liability by purchasing the reversion at the expense of others. That would be to intercept the right of the *cestui que trust*. It does not at all appear that he might not have renewed.

Further, he could not, by purchasing the reversions, destroy in equity those terms of years which he held as a trustee. As to those terms of years, William Ellis Wall (the son) was entitled absolutely after his father's death, and they formed part of his personal estate. The administratrix does not, however, propose to carve out of the inheritance terms of years such as those which have been legally merged. Being *cestui que trust* of the leasehold interest, she claims the fee simple as an accretion to the term in each case acquired by the trustee of such term. No doubt William Ellis Wall (the son) might have dealt with the property so as to obliterate any such question by adopting the purchases. But that he did not do.

715] *If considered apart from the statutes under which the purchases were authorized and made in each case, it would be at the option of the *cestui que trust* whether he would adopt the purchased accretion or not. And the right of adoption must belong to the person who takes the trust property, i.e., in this case the terms of years which were personal estate; and if considered as purchases made under statutable authority, then the principle established with respect to purchases under the Lands Clauses Consolidation Act applies. In either case the administratrix takes the property which now represents her late husband's leasehold for years, as forming part of his personal estate in view of a court of equity.

Byrne, for the defendants, the legal personal representatives of William Ellis Wall (the father): As to the estate No. 1, William Ellis Wall (the father) was one of the lives in the lease granted to the trustees, at the time of the en-

(') 3 Madd., 491; 5 Madd., 471.

franchisement, which was voluntary. This sum was an outlay or advance by the tenant for life and trustee for the benefit of the persons interested, and it was a charge which his estate ought to be paid with interest at 4 per cent. from his death; and the same argument will apply to the purchases of the reversions of leaseholds which were conveyed to William Ellis Wall (the father). His estate will be entitled to be recouped those moneys. One estate was held on a lease for forty-one years. If a trustee purchases of a tenant for life the reversion of a lease which is renewable, the conveyance is not absolutely for his own benefit, but only on the election of the *cestuis que trust*.

[He referred to *Bradford v. Brownjohn* (¹); *Randall v. Russell* (²); *Jones v. Jones* (³); *Lewin on Trusts* (⁴); *Lawrence v. Maggs* (⁵); *Hayward v. Pile* (⁶).]

HALL, V.C.: As to the estate purchased in 1858 (No. 1) the case seems to me to stand thus: The tenant for life advanced the purchase-money for the enfranchisement, and the estate was conveyed to *the purchaser of the [716 reversion and his co-trustee upon the trusts of the settlement declared by the will. That being the position of the tenant for life, has he, in the absence of any declared intention that the purchase-money should enure for the benefit of the persons entitled in remainder under the will, given the charge up or extinguished it in any way? In the position of tenant for life he received the whole of the income, and therefore the income was charged. He was practically in receipt of the income so charged until it could be shown that the charge was got rid of. The instructions in 1872 for the preparation of the drafts clearly negative any intention to give it up at that time. It has not been shown that the right and interest which the tenant for life had as incumbrancer when he paid the purchase-money was ever released or extinguished. The tenant for life was one of the lives in the lease. It has not been shown that either by custom or usage the time for renewal had arrived before he died: I must hold that the charge exists, and that the estate of the tenant for life is entitled to be paid the £110 with interest at £4 per cent. from his death. Mr. Beaumont contended that where there is a trust for renewal of leaseholds for years or for lives the tenant for life is under an obligation to renew; that he is bound to provide a sufficient sum for renewal when the time comes, and that that is a reason why

(¹) Law Rep., 3 Ch., 711, 714.

(²) 3 Mer., 190, 197.

(³) 5 Hare, 440.

(⁴) 6th ed., p. 322.

(⁵) 1 Eden, 452.

(⁶) Law Rep., 5 Ch., 214.

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this tenant for life's estate should not be allowed to have a charge, but I do not think that that argument ought to succeed in this case. The obligation was one which never had any operation or effect in reference to this tenant for life. Does a tenant for life pay anything except as a contribution to that which is paid in reference to his enjoyment of that which is acquired by him? Where he never enjoys anything by reason of the renewal or purchase, he never pays anything at all. He comes into possession as tenant for life, and there is a trust for renewal. When the time comes for renewal, the lease is renewed, and so much is paid. If the first tenant for life be not living at that time he gets no benefit at all by the transaction. There must be something very special in the settlement to charge the tenant for life prospectively with a sum in the nature of a payment for renewals when he may never get any benefit from them. The principle, generally, is payment and apportionment of the fine, or whatever the payment may be, among [717] *the parties in reference to their enjoyment of that newly acquired lease, not the enjoyment beforehand. In the case of *Bradford v. Brownjohn* Lord Justice Page Wood (') said: "The mode in which the lessors compute the fine is this: They say what is the value of this lease as a lease for twenty years in possession? Having ascertained that they say—inasmuch as it will not fall into possession for twenty years, you cannot pay the value down as if you were going to take possession immediately; what you must pay down is a sum of money which, invested and accumulated for twenty years, will at the end of that time amount to the value of the lease in possession. Then, in considering what the remainderman ought to pay on the death of a tenant for life when the renewal has been effected by the tenant for life, first take the simple case where the tenant for life happens to die at the end of the original forty years and before the reversionary twenty years comes into possession. In that case the tenant for life has bought, solely for the benefit of those who come after him, a twenty years' lease in possession. They, finding a twenty years' lease in possession, ought to pay for it according to its value. What is that value? The amount of the sum paid down twenty years ago with compound interest. After the death of the tenant for life simple interest only is computed, the right to possession of the estate on payment of an ascertained sum having accrued at the death of the tenant for life."

According to that the remainderman there had to pay the

(') Law Rep., 3 Ch., 713.

whole, and there was no contribution by the tenant for life. But this case, there being no trust for renewal applicable to the leaseholds for years, is the simple one of payment and advance made by the tenant for life, of which the remainderman claims the benefit, and he must pay the whole amount. This disposes of the other questions raised in reference to the purchase of the reversion of No. 5, and the same principle applies to the other purchases, excepting No. 6, and as to that transaction, which took place in 1868, I think it was in the nature of a bargain between the father and the son—an arrangement between them—and the result was that the son became tenant in tail of freeholds, freed from any charge, instead of being absolute owner of copyhold. The only *other question remaining is, whether [718 the legal personal representative of William Ellis Wall (the son) is entitled to have his estate placed in the same position as to the leaseholds for years, No. 4 and No. 5, as if the enfranchisement had not taken place; as he would have been absolutely entitled to the terms of years; and it appears to me that the court ought not to allow the tenant in tail of the freeholds and absolute owner of the leaseholds, subject to the interest of the tenant for life, to be deprived, by a voluntary act of the tenant for life, of his interest in the leaseholds by their being turned into freeholds; but that would be the effect of my decision if I excluded the title of the legal personal representative of the first tenant in tail. I am of opinion that I must treat these estates as regards the legal personal representative of the first tenant in tail as subject to leases to be carved out of them for the benefit of his estate. The cases of the two estates, No. 4 and No. 5, are distinguishable. It seems to me that the larger (No. 5) having been purchased and conveyed expressly subject to the trusts of the will, the parties interested in it are those who are interested under the will, subject to this, that the tenant for life has a charge for the purchase-money; and the legal personal representative of the tenant in tail has a leasehold interest of the same extent as would have existed had the term of years continued. As regards the other estate (No. 4), it seems to me that the sound view is to hold that the title acquired must take the place of the title existing at the time when the purchase took place, and that the parties entitled are those interested in the continuance of the lease at that time; the tenant for life and the tenant in tail of the freeholds and absolute owner of the leaseholds. The result will be that William Ellis Wall (the father) became tenant for life of this estate (No. 4) with a right to the

charge, and that subject thereto William Ellis Wall (the son), the tenant in tail, became the absolute owner thereof.

There must be a declaration that the estates No. 1 to No. 5 are subject to the charges; that the estate (No. 5) is to be taken as if the lease were still subsisting, and that the legal personal representative of the first tenant in tail is entitled to it for such a term of years as would be equal to the term if the reversion had not been purchased, and sub-719] ject to such leasehold interest, the estate will *go according to the limitations in the will; that there must be a conveyance of the estate (No. 4) upon payment of the charge upon it; and that the estate (No. 6) belongs to the heir-at-law of William Ellis Wall (the son).

The costs, charges, and expenses properly incurred of the trustees, and the costs as between solicitor and client of all other parties, must be paid out of the fund.

Solicitors: *F. J. & G. J. Braikenridge.*

[6 Chancery Division, 719.]

V.C.H., May 2, 1877.

ASHTON V. STOCK.

[1875 A. 48.]

Coal Mine—Covenant not to get Coal for Sale—Trespasser—Adverse Possession of Mines—Statute of Limitations—Accounts—Allowances.

The plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Queen Elizabeth, wherein the grantor reserved to himself and his heirs male a rent-charge of 7s. 8d., and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon.

The defendant, claiming title under a demise from a defendant of the same grantor, had for more than twenty years worked from mines of his own under adjacent lands, into, and had taken coals from, the mines under the plaintiffs' lands:

Held, first, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it; secondly, that the defendant had not acquired any title to the mine by possession under the Statute of Limitations, and that the plaintiffs were entitled to an injunction with an account for six years; and thirdly, that, as the defendant had been working under a *bona fide* belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal as well as bringing it to bank.

By indenture dated the 10th of April, in the fortieth year of the reign of Queen Elizabeth, Sir Thomas Gerard and Thomas Gerard his son, in consideration of £16 17s. 4d., granted a farm and lands of about twelve acres, at Ashton-in-Makerfield, in the county of Lancaster, with its appur-720] tenances, unto and to the use of Bryan *Sixsmith, the

his heirs and assigns, "yeelding and payinge therefore yeerely to the said Thomas Gerard and to the heirs males of the bodie of the said Thomas lawfully begotten, and for want of heires males of the said Thomas then such personne and personnes as" by a certain indenture therein mentioned appointed, "the yerely rent of seaven shillings and eightpence," and also doing suit and service in and paying reasonable fines to the court of Sir Thomas, and finding one sufficient footman to serve in the wars within England and Scotland at the times and in manner therein specified. And the indenture contained a power of distress in case of non-payment of rent, or non-performance of the suits and services, covenants by Sir Thomas and his son to suffer a recovery and levy a fine, and also a proviso in the following terms:—

"Provided allwaies and the said Bryan Sixsmithe covenante-ing and agreeinge for himself and his heires, executors, and assignes, and evrie of them, to and with the said Sir Thomas Gerard and Thomas Gerard, Esqre., their heires, executors, and assignes, by theese presents, and the true intente and meaninge of theese presents is that the said Bryan Sixsmithe, his heires or assignes, shall not digge, delve, take, or gett any coles of or in the before-bargained premises, or any parte or parcell thereof, at any time or times hereafter to bee sould or geven, but onely such as shal bee burned and occupied or ymployed in and uppon the same tenements and premises, and not otherwise nor in any other manner."

By indenture dated the 24th of June, 1629, the said Bryan Sixsmithe granted the same farm with all "wages . . . mynes, quarries . . . and appurtenances" to several persons who were the then trustees of a charity known as the Seneley Green Grammar School, their heirs and assigns, upon trust to employ and dispose of the rents and profits for the use of the grammar school, reserving unto the said Sir Thomas Gerard during his life, and afterwards to him or them to whom the same for the time being should appertain, the yearly rent of 7*s.* 8*d.*, with such other suits and services as the said premises were chargeable with by reason of the above-mentioned indenture.

*The three plaintiffs were the present trustees of [721 the charity, and they instituted the suit with the sanction of the Charity Commissioners. By their bill they alleged that the defendant, by means of openings from the mines in the adjacent lands, had entered the mines and strata under their lands without their license, and had gotten and carried

away therefrom coal to a large extent, and had made levels in their mines, and carried away the materials, and had used such levels and the mines of the plaintiffs for carrying coals and materials to and from the mines under the adjacent lands, and for the passage of air, and other purposes; and they prayed for an injunction to restrain the defendant from digging or getting any coals or minerals from, and from using any passages within or under their said farm and lands; that the defendant might be decreed to pay to them the value at the pit-bank of all coal gotten by him (including therein coal rendered unworkable in the course of such getting) under the said farm and lands, and to pay a way-leave rent in respect of all substances conveyed by him through or under the said farm and lands from or to any other mines worked by him; and for ancillary relief.

The defendant, by his answer, alleged that he had always understood and believed that the mines and beds of coal under the plaintiffs' farm and lands had been reserved to the late Sir John Gerard and his predecessors in title, and he admitted the acts of which the plaintiffs complained, but he alleged that he was a lessee of the said mines of coal under a lease thereof made by the late Sir John Gerard, who at the date of such lease was the person then entitled to the rent-charge of 7s. 8d. reserved by the first indenture above mentioned; and that under such indenture no right to or interest in the mines and beds of coal under the farm and lands thereby granted passed to Bryan Sixsmith, his heirs and assigns, except the limited right which was the subject of the proviso in that indenture contained, but that subject thereto the said mines and beds of coal remained vested in the Gerard family, and descended to the said Sir Thomas, as whose lessee the defendant claimed the right to work them; and that neither the plaintiffs nor any of their predecessors, trustees of the charity, had ever exercised such limited right. The defendant further alleged that he commenced to work to get the coals under *the plaintiffs' lands twenty years and upwards before the filing of the bill, and that, though the trustees of the charity, or some of them, had been aware of his workings from their first commencement, no objection thereto was ever raised until May, 1874, a year before the filing of the bill; and he claimed the benefit of the Statute of Limitations.

It appeared from the evidence that the defendant began working in the year 1847, with the knowledge of one of the former trustees, who was under the impression that the coal

did not belong to the charity ; but that the three present trustees being advised, in the year 1869, that the coal was theirs, a letter had been written by their authority to the defendant, suggesting that he should take a lease from them of the mines under their farm, to which the defendant had replied in a letter dated the 16th of November, 1869, wherein he admitted his working under their land, claimed the right to do so as lessee from Sir John Gerard, to whom, he asserted, the minerals in question belonged, and suggested that the trustees had better consult their deed. Nothing further was done from the date of this letter until, by the direction of the Charity Commissioners, this bill was filed.

Dickinson, Q.C., and *G. B. Finch*, for the plaintiffs : The conveyance to Bryan Sixsmith must be read as if the proviso with regard to the manner in which the coals were to be gotten had not been contained in it. For that proviso is not in the nature of an exception or a reservation to the grantor, but of a condition restricting the enjoyment of the grantee, and, as such, it is repugnant to the grant of an estate in fee simple : *Sheppard's Touchstone*(¹). The plaintiffs being accordingly seised in fee simple of these mines, are entitled to restrain the defendant from prosecuting this continuing trespass.

Then, in the next place, no such period has elapsed as to supply any presumption of grant under the Prescription Acts ; and the defendant can have acquired no rights against the plaintiffs under the Statute of Limitations. A person cannot, by using or working one portion of a coal mine, acquire a right to any other portion of it, and the defendant cannot, therefore, have acquired *a title to anything [723 more than the coal which he took away upwards of twenty years ago, or to the particular chamber from which it was taken. In *MacDonnell v. MacKinty* (²), it was held that the omission to work quarries for twenty years was not a discontinuance within the meaning of the Statute of Limitations, and also that a user and possession of part of the quarries would not justify presumption of the possession of the whole so as to oust the owner's title. *Davis v. Shepherd* (³) is another authority in favor of the latter proposition. There is no presumption in favor of a trespasser ; and the statute will not apply unless there is both absence of possession by the person who has the right and actual possession by another : *Smith v. Lloyd* (⁴).

(¹) Vol. i, ch. 6, p. 181.

(²) 10 Ir. Law Rep., 514.

(³) Law Rep., 1 Ch., 410.

(⁴) 9 Ex., 562, 572.

We admit that we cannot claim an account against the defendant for more than six years, but, as the severing the coal was a wrongful act by a trespasser, in taking such account the defendant should not be allowed the expense of severing the coal from the mine: *Fothergill v. Phillips* (¹); *Morgan v. Powell* (²); *Llynvi Company v. Brogden* (³).

Cotton, Q.C., and *Bagot*, for the defendant: No doubt a condition repugnant to the estate of a grantee is bad, but the proviso in the original grant here is not a condition but a covenant which might be enforced in equity in the same way as a covenant not to build, and its existence must be taken into account in considering the question of the damages, if any, to which the plaintiffs are entitled. Although mere non-user will not affect the rights of an owner of mines, user by another will; and if the arguments of the other side hold good, and the trespasser is only in possession of what he has made a chattel of, the Statute of Limitations does not apply to mines at all, and there can be no such thing as adverse possession of a mine. Suppose, however, the trespasser runs galleries round the whole mine? If there is, as here, an intention to take possession of and work the whole of the coal under a particular field, working the coal must be taken as possession not only of the coal severed, but of 724] the entirety of the *coal, within the workings at all events; and if possession is taken in such a way as to show claim to the whole, the statute will run as to the whole. There are very few cases on the adverse possession of mines; but in *Low Moor Company v. Stanley Coal Company* (⁴), where there was a demise of several seams of coal and a working of two seams, that working was, under the circumstances, considered possession of the whole. But if the plaintiffs' claim is not barred by the statute, it is admitted that no account can be carried back against the defendant for more than six years; and as he has been working under a *bona fide* and reasonable belief as to his title, and it is not a case of wilful trespass or of fraud, he ought to be allowed not only the expense of "haulage," or bringing the coal to the pit's mouth, but also that of "hewage," or detaching it from the solid rock, and making it a chattel; for in such a case the value is what the owner has lost, i.e., the thing as it existed unhewn in the pit. Otherwise, the plaintiff would have an undue advantage, and the defendant would receive the punishment of a wilful trespasser. The defendant ought therefore to pay only the value of the coal as if he had pur-

(¹) Law Rep., 6 Ch., 770.

(²) 3 Q. B., 278.

(³) Law Rep., 11 Eq., 188.

(⁴) 34 L. T. (N.S.), 186.

chased the mine: *Jegon v. Vivian* ⁽¹⁾; *Hilton v. Woods* ⁽²⁾; *Llynvi Company v. Brogden* ⁽³⁾; *In re United Merthyr Collieries* ⁽⁴⁾.

HALL, V.C., having called upon Mr. Dickinson to reply only upon the question of the allowances to be granted to the defendant in taking the account against him,

Dickinson, in reply: In *Jegon v. Vivian* the plaintiff, knowing and asserting his own title, lay by, and allowed the defendant to incur an expense of which he sought to obtain the advantage; and *In re United Merthyr Collieries* was a similar case; while in *Hilton v. Woods*, upon notice of appeal, the defendant submitted to be charged with the expense of severance: *Llynvi Company v. Brogden* ⁽⁵⁾. In this case there was no acquiescence or lying by on our part, and the delay in filing our bill led to no expense on the defendant's part, as he *was working from shafts [725 sunk on his own land. We are trustees of a charity against whom a title has been asserted for many years, who could only proceed with the sanction of the Charity Commissioners, and a considerable portion of whose coal the defendant has got for nothing; so the account ought to be taken on the principle of *Fothergill v. Phillips* ⁽⁶⁾, and not of *Jegon v. Vivian* ⁽¹⁾.

HALL, V.C.: It appears to me that the plaintiffs' title to relief is clearly made out to the extent of an injunction, according to the prayer of the bill. It is clear to my mind that the coal in question was the subject of conveyance by the deed of the 10th of April, in the fortieth year of the reign of Queen Elizabeth, and was transferred by the deed of the 24th of June, 1629, and has come from the parties who so derived title by the second deed to the plaintiffs in this suit. The clause in question is not a reservation or exception, but a covenant that the covenantor, who is the grantee, would not work the coal "to bee sould or geven, but onely such as shal bee burned and occupied or ymployed in and uppon the same tenement and premises, and not otherwise nor in any other manner." Whether this court would have interfered by injunction upon such a covenant or not, it is unnecessary for me to say. Of course there are authorities, and probably authorities governing this case, that if there be a covenant, the court will, unless it is repugnant to the grant, act upon it without inquiring into the question whether the person entitled to the benefit of the covenant has been

⁽¹⁾ Law Rep., 6 Ch., 742.

⁽⁴⁾ Law Rep., 15 Eq., 46; 5 Eng. R., 707.

⁽²⁾ Law Rep., 4 Eq., 432.

⁽⁵⁾ Law Rep., 11 Eq., 191.

⁽³⁾ Law Rep., 11 Eq., 188.

⁽⁶⁾ Law Rep., 6 Ch., 770.

damnified or not. It would, I think, probably be very difficult in this particular case to find a proper plaintiff to such an action as that. The covenant is with Sir Thomas Gerard and Thomas Gerard, Esq., their heirs, administrators, and assigns; and, considering that it was entered into on the 10th of April, in the fortieth year of the reign of Queen Elizabeth, it would probably be very difficult now to make out who are the persons entitled to the benefit of the covenant and to sue as plaintiffs upon it. But supposing that to be a covenant, as it unquestionably is, it is not necessary for me to consider, for the purposes of this action, whether 726] it is so repugnant to the grant itself as that this *court would consider it inoperative. It certainly appears to me that the existence of such a covenant as that, treating it as valid, cannot affect the measure of damage, the coal having passed to the grantee, and the grantee being entitled, notwithstanding that covenant, to get the whole of the coal, to burn it, and employ it in and upon the premises. The property being coal, if a trespasser takes away that coal, I cannot measure the damage in any other way than by the value of that coal. I cannot discount it in any way by the consideration of whether it would ever have been gotten or not for the purpose of being employed upon the tenement and premises.

That being so, the next consideration is whether there is any difficulty in the plaintiffs' way by reason of the defendant having been working and getting some of this coal for a period of more than twenty years. I can well understand that there might be cases in which, from the manner of working coal, a person who began to work it, and was a mere wrongdoer and trespasser, might have acquired a title to a certain seam or area of coal, and that, by the mode of driving the levels and opening a certain area of coal, there might have been possession acquired to the whole thing as a mine or as a seam of coal, and not merely to the particular quantity of coal that was actually hewn and gotten. That is not, however, this case; and it is not necessary for me to say more than that such a case may exist. All that we have in this case is, that the adjoining proprietor, while engaged in working his own coal, has gone on working into the vein, and getting out a certain quantity of his neighbor's coal. That unquestionably will not give a title under the statute, or in any way, to the wrongdoer. Then the next question being as to the time during which the account is to go, that is clearly covered by the statute; and about that there is no dispute.

The only remaining question is, upon what principle the defendant is to be held to be liable—whether he is to be allowed, in fact, for the cost of hewing and getting the coal in addition to the cost of bringing it to the pit's mouth? That is now the whole dispute between the parties. As to that, it appears that the defendant had agreed with the grantor, or the person who derived the title under the grantor, of this mineral property, for a tenancy *or [727 occupation; but the deed or agreement under which he took possession has not been put in evidence on either side; and, therefore, I cannot say whether it bears in favor of one or the other; there was, however, a possession which purported to be authorized so far as the person claiming title to the coal was concerned. Having got that title with the knowledge of one of the trustees, who were the real owners of the coal, he went on working under what I must consider was a *bona fide* belief at the time that he had a right and title to do it.

That being so, the matter seems to have gone on in that way for a number of years until the plaintiffs', trustees of the charity, were advised that the coal belonged to them; and upon that the letter was written which the defendant answered in his letter of the 16th of November, 1869. After this letter, however, nothing was done for nearly six years before this bill was filed, and the defendant went on working. Under such circumstances, it seems to me that it would be very harsh to deprive the defendant of the benefit of the allowance for hewing the coal. It seems to me that, if there were no authority whatever upon the subject, it would be harsh to deal with him in that way. It does not, however, depend upon whether it is harsh or not, because, having regard to what was laid down by the Lord Chancellor in *Jegon v. Vivian* (¹), to say nothing of what was super-added to that by Vice-Chancellor Malins and Vice-Chancellor Bacon in the cases before them, I think I ought not to give the account of coal gotten in this case except in such a way as to allow the defendant to deduct from the value of the coal at the pit's mouth the expense of hewing and hauling, in other words, the expense of severing the coal as well as bringing it to bank.

Then there must be an inquiry; and the defendant must pay the costs of the suit up to and including the hearing.

Solicitors: *Sharpe, Parkers & Co.*, agents for Ackerley & Sons, Wigan; *Meynell & Pemberton*.

(¹) Law Rep., 6 Ch., 742.

[6 Chancery Division, 728.]

V.C.H., June 18, 1877.

728]

*DAVIES V. JENKINS.

[1875 D. 9a.]

Joint and Several Promissory Note by Husband and Wife—Bankruptcy of Husband—Separate Estate of Wife—Trustees not made Parties.

A woman, married since the passing of the Married Women's Property Act, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:

Held, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action.

THIS was an action, in which the writ was issued in November, 1875, by H. H. Davies against J. H. Jenkins and Gwenllian Jenkins, his wife. The statement of claim set forth that the wife was, under the will of David David, and otherwise, possessed of or entitled to considerable separate property, and that the plaintiff (the stepfather of the wife) gave credit to the defendants upon the faith of such separate property.

On the 20th day of March, 1874, the defendants made and signed their joint and several promissory note, whereby they jointly and severally promise to pay to the plaintiff or his wife the sum of £200 three months after date. The consideration for the said note was money lent to the defendants by the plaintiff. The money had not been paid. J. H. Jenkins had become bankrupt, and his estate had paid 6d. in the pound. The plaintiff claimed to have a declaration that the separate property of the wife was liable for the amount of principal and interest due and the costs of the action, and asked for inquiries and accounts. The marriage of the defendants took place after the passing of the Married Women's Property Act, 1870.

The evidence, which was conflicting, was in effect that the proposal to borrow the money came from the husband, and that he said his wife would join in signing the note; that the plaintiff declined to lend the money unless the wife would join in signing the note; that he sent the money to his own wife, who was in Wales, with instructions not to part with it except upon certain conditions being complied [729] with, and that those instructions were *not followed, as she did part with it before the note was signed. Mrs. Jenkins declined at first to join in signing the note, but after the money had been received by the husband she did

do so. The plaintiff had refused to accept the composition 6*d.* in the pound from the bankrupt's estate.

Hadley, for the plaintiff, submitted that the plaintiff was entitled to judgment against the separate estate of the wife generally, and to an inquiry as to what it consisted of. At the time the note was signed there were arrears of income due to the wife. The Married Women's Property Act, 1870, had placed married women in a position of being able to sue and to be sued. There was no necessity now to make any trustees in such a case parties to the action. He referred to *Johnson v. Gallagher* ⁽¹⁾.

A. Bailey, for the defendant, the wife, objected to any inquiry being directed. It was unnecessary, as there had been an answer to the interrogatories, and also an affidavit by the trustees. The plaintiff was bound to set forth the particular fund which he wished to obtain payment out of, and the trustees of it ought to have been made parties to the action, as there could be no decree against a married woman personally. There was nothing in the Married Women's Property Act, 1870, to prevent trustees being made parties, and if there were no trustees the husband would be a trustee for her. The wife was only in the position of a volunteer and a surety, and as such she had been discharged by the plaintiff's refusal to take the composition of 6*d.* in the pound. There ought to be no inquiry except at the risk of the plaintiff, who asked for judgment now in order to entitle him to all the costs. There was, looking at the circumstances, no consideration for the wife's signature to the note, the money having been paid previously. He submitted that the court ought to discountenance the practice of getting married women to put their names to such documents, as it was done for the purpose of pressure being placed upon them for payment of their husbands' debts. He referred to the case of *Francis v. Wigzell* ⁽²⁾.

Hadley, in reply: Any authority to be found in Mr. Maddox's reports could not *apply to a case which [730 had occurred since 1870. There could be no doubt, upon the evidence, that the money was lent to the husband and wife, and therefore the plaintiff was entitled to judgment against the separate property generally, and to costs.

HALL, V.C.: I am of opinion that where there is a dispute as to what the separate property of a married woman consists of, the proper course is to direct an inquiry in the first instance. There is nothing in the Married Women's Property Act, 1870, in reference to charging separate prop-

⁽¹⁾ 3 D. F. & J., 494.

⁽²⁾ 1 Madd., 258.

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erty generally, and I think that the plaintiff is only entitled to a judgment in the form set forth in the case of *Picard v. Hine* (¹), i.e., declare that all the property of the defendant, the wife, vested at this present date in her or in any other person or persons in trust for her, is chargeable with the payment of the amount due for principal and interest upon the promissory note, after deducting 6d. in the pound from such amount, that sum having been tendered to the plaintiff on the liquidation of the bankrupt's estate. Then let the accounts and inquiries be taken, as in the case of *Picard v. Hine*, i.e., inquire of what the separate property consists of, and in whom it is vested, and when the amount so tendered has been certified, let it be deducted in taking such accounts. It appears to me that the wife's property is liable. She signed the note, and when she did so she knew well what she was doing. I do not think that, upon the evidence, there was any want of consideration. It was part of the original bargain for the loan that she should join in signing the note. As to the argument of Mr. Bailey, that the trustees ought to have been made parties, I am of opinion that it was not necessary. The form of the order in *Picard v. Hine* goes to the length of charging any sum vested in anybody, and there would in this case be no advantage in alleging a claim to any particular sum vested in some particular person. To do that might lead to inconvenience, and add to the costs by making such person a party in the first instance.

Solicitors: *Chester & Co.*, agents for W. D. Williams, Aberdare; *I. H. Wentmore*, agent for Clement Waldron, Cardiff.

(¹) Law Rep., 5 Ch., 278.

[6 Chancery Division, 735.]

V.C.H., July 14, 1877.

735]

*CRACKNALL V. JANSON.

[1876 C. 171.]

Mortgagor, Bankruptcy of—Trustee in Liquidation—Giving up of Security and Proof of Debt by prior Mortgagee—Rights of subsequent Mortgagees—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, ss. 6, 16, 17, 40)—Bankruptcy Rules, 1870, rr. 99, 100, 134, 136, 272.

Proof in the liquidation of the estate of a mortgagor under the Bankruptcy Act, 1869, by a first mortgagee, for his whole debt, and giving up the security to the trustee, put the trustee, under the operation of the statute, in the place of the first mortgagee, and do not accelerate the rights of subsequent mortgagees.

[6 Chancery Division, 739.]

V.C.H., July 20, 21, 1877.

**In re POOLE'S ESTATE.*

[739]

THOMPSON V. BENNETT.

[1876 P. 215.]

Married Women's Property Act, 1870 (33 & 34 Vict. c. 93)—Deceased Married Woman—Earnings—Equitable Assets.

The separate estate of a married woman in earnings, under the Married Women's Property Act, 1870, becomes upon her death equitable assets and divisible amongst her creditors *pari passu*, so that her executor has no right to retain in full his own debt thereout.

THIS was a creditor's administration action.

Mrs. Poole, the testatrix in this case, was a married woman who had carried on the business of a milliner apart from her husband. *She died in May, 1876, having [740 by her will recited that she had acquired considerable property which, under the Married Women's Property Act, 1870, formed part of her separate estate, and having appointed James Bennett executor, and having directed him to pay and discharge all her just debts. Probate of the will was granted to the executor, limited to the administration of all such personal estate and effects of the deceased as she acquired by her earnings in the trade or business of a milliner, and all investments thereof since the 9th of August, 1870, which she had power to dispose of, and had by her will disposed of accordingly, but not otherwise.

The executor had received on account of the personal estate of the testatrix £2,315, and he claimed to retain thereout £1,605 in respect of a debt due to him. The estate was insufficient, and the other creditors disputed his right. The estate was under the administration of the court, and the question of the executor's right to retain the £1,605 was brought before the court by summons.

Hastings, Q.C., and *Broome*, for the creditors: An executor has a right to retain his own debt only out of legal assets.

Before the Married Women's Property Act, 1870, her separate property was equitable assets, and her creditors were paid out of it *pari passu* because they could only affect her property in a court of equity, and their debts having no existence at law, were considered equal in equity: *Silk v. Prime* (1); *Bruere v. Pemberton* (1); *Murray v. Bar-*

(1) Tu. L. C., 4th ed., pp. 111, 136.

(1) Anon., 18 Ves., 258.

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In re Poole's Estate. Thompson v. Bennett.

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lee⁽¹⁾; *Owens v. Dickenson* ⁽²⁾; *Shee v. French* ⁽³⁾; *Johnson v. Gallagher* ⁽⁴⁾. The only case at variance with these authorities is *Shattock v. Shattock* ⁽⁵⁾, where the late Master of the Rolls, in deciding that property settled to the separate use of a married woman for her life and appointed by her under a power to appoint the reversion by deed or will, is not liable after her death to the payment of her debts, says: "It follows that in the administration of the separate estate of a married woman after her decease, the debts are to be [741] paid in order of *priority and not *pari passu*." This was inconsistent with the judgment of Lord Justice Turner in *Johnson v. Gallagher* ⁽⁶⁾. But *Shattock v. Shattock* ⁽⁷⁾ was expressly disapproved of by the Judicial Committee of the Privy Council in the *London Chartered Bank of Australia v. Lemprière* ⁽⁸⁾, who in so doing stated their concurrence with the view of Lord Justice Turner.

We then come to the act itself, and all that it does is to enact that certain earnings and property which previously were not separate estate shall be so for the future. It does not alter the character or incidents of separate estate, nor does it give the married woman any legal right of action except in the 11th section, which gives her during her husband's life the right to maintain in her own name as to her separate property. The operation of that section, therefore, is confined to the coverture, and leaves untouched the nature of her assets after her death.

As was said by the Master of the Rolls in *Howard v. Bank of England* ⁽⁹⁾, the act carefully distinguishes "between the right to the property itself and the remedy given for the recovery or protection of the property. . . . It gives no power to contract to a married woman which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a court of equity, and it superadds to that certain remedies in a court of law which it is considered desirable to give to the married woman in respect of these small sums, but beyond that I think the act makes no alteration in the position of the married woman." These assets are accordingly equitable assets, and the executor has no right of retainer.

Dickinson, Q.C., and *Horton Smith*, Q.C., for the defen-

⁽¹⁾ 3 My. & K., 209.

⁽²⁾ Cr. & Ph., 48, 53.

⁽³⁾ 3 Drew., 716.

⁽⁴⁾ 3 D. F. & J., 494.

⁽⁵⁾ Law Rep., 2 Eq., 182, 194.

⁽⁶⁾ Law Rep., 2 Eq., 182.

⁽⁷⁾ Law Rep., 4 P. C., 572, 594.

⁽⁸⁾ Law Rep., 19 Eq., 295, 300, 301.

dant Henry Bennett, the executor: The preamble of the act shows that it was intended to amend the law of contract as well as the law of property. Then, under the act itself, a particular kind of separate property is created by *law, [742 and to the married woman is given the power of suing at law, *Summers v. City Bank* (1); while she is rendered liable to be sued at law; and it is only in sect. 10 (with regard to policies) that the act contemplates the introduction of a trustee. The observations of Lord Justice Mellish in *Ex parte Holland* (2) show that in his opinion a married woman having separate property under the act could be made a bankrupt; and the inference from the whole act is that it intended to create a new property of a nature differing from the separate estate known to the Court of Chancery and having legal incidents; and one of such legal incidents will be that in the hands of an executor it is legal assets. If so, he has the right of retainer.

[They also referred to *Picard v. Hine* (3) and *Ramsden v. Brearley* (4).

Hastings, in reply: The test whether assets are legal or equitable is the answer to the question whether the creditor can get at them through a court of law or must come into equity. At law a married woman could not, before the act, have been sued by her creditor, and if he had any claim against her separate estate he must have come into equity, and the only difference made by the act is that under sect. 12 he may sue her for ante-nuptial debts. This is separate estate under the act, with its equitable attributes coming to the executor only as separate estate, and being in his hands equitable assets. The grant of probate of the will of a married woman was always limited to her separate estate, or to that over which she had a power of disposition, and since the act it is granted in precisely the same form. In *Ex parte Holland*, the married woman was sued in respect of a debt contracted before marriage under the express provisions of sect. 12 of the act of 1870; and therefore the observations of Lord Justice Mellish are mere *obiter dicta* as to any other part of the act, while those of Lord Cairns, L.C., and Lord Justice James, in the same case, tend the other way. Those learned judges considered that the act should not be strained; and, least of all, *should [743 it be strained by introducing an enactment that a married woman may be sued at law in respect of her separate estate generally, merely for the sake of conferring upon her ex-

(1) Law Rep., 9 C. P., 580.

(2) Law Rep., 9 Ch., 307, 311.

(3) Law Rep., 5 Ch., 274.

(4) Law Rep., 10 Q. B., 147.

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Oppenheimer v. British and Foreign Exchange, &c., Bank.

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ecutor what has always been considered an unrighteous privilege.

HALL, V.C.: In the Married Women's Property Act, 1870, there is no express provision as to the married woman being sued, excepting in the one particular case provided for by the 12th section as to ante-nuptial debts. Whether this be an intentional omission or not, I think the true construction of the act is that the remedies in other respects must be such as they were before the act, that is, by resort to a court of equity. In coming to this conclusion, I put out of consideration the Judicature Act, which has no bearing upon the question. That being so, the separate property referred to in the act must be taken to be separate estate to be got at in the same way as under the old law, namely, through a court of equity. I do not rely upon the 11th section, which gives the wife the right to maintain an action in respect of her separate property; for that section only applies as between the husband and the wife, and is only available during the lifetime of the wife. The sound construction, therefore, is, that the separate property of the wife under the act is equitable assets distributable and to be applied, after her death, according to *Owens v. Dickenson* (¹) and the other cases, *pari passu* amongst her creditors; the result of which is that the executor in the present case has no right of retainer.

Solicitor for plaintiff: *John Attenborough*.

Solicitors for defendants: *Austen, De Gex & Harding*.

(¹) Cr. & Ph., 48.

[6 Chancery Division, 744.]

V.C.H., July 30, 1877.

**744] *OPPENHEIMER V. BRITISH AND FOREIGN EX-
CHANGE AND INVESTMENT BANK.**

[1876 O. 31.]

Company—Winding-up Lease—Claim by Lessor—Future Rent—Companies Act, 1862, s. 158.

A banking company which had been registered under the Companies Act, 1862, obtained demises of premises from the plaintiff, and covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding-up of the company, though it was not insolvent. A question having arisen as to plaintiff's claim for the future rent, he brought an action for an injunction to restrain the distribution of the assets until the liability of the company had been provided for:

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Held, that the lessor was entitled to have a sum set apart which, when invested in consols, would, with half yearly rests, be sufficient to produce the amount of the rent.

ADJOURNED SUMMONS. The British and Foreign Exchange and Investment Bank (Englisches Bank-und Wechsel-Geschäft), Limited, was registered on the 15th of January, 1872, under the Companies Act, 1862.

The original amount of the capital of the company was fixed by the memorandum of association at £1,000,000, divided into 200,000 shares of £5 each, but by an order made by Vice-Chancellor Hall, in July, 1874, the capital was "reduced" to £300,000, divided into 100,000 shares of £3 each. The plaintiff, Charles Oppenheimer, demised to the company premises numbered 30 Throgmorton Street, by two leases, at an aggregate rent of £2,325, with covenants to keep in proper repair and to pay rent for the terms of years, twenty-one and nineteen and a half, at the usual periods. There was also a covenant not to sublet without the consent of the lessor. The company, after an occupation of these premises for three or four years, removed their business to premises numbered 56 Threadneedle Street, and with the consent of the lessor sublet part of the premises in Throgmorton Street, the company agreeing to restore the premises, which had been extensively altered by the sub-lessee, to their original state, if required. In March, 1876, the shareholders passed a resolution that the company, though not insolvent, should be voluntarily wound up, *and [745 the defendants, other than the company, were appointed liquidators, and they had distributed amongst the shareholders a part of the assets of the company. A correspondence took place between the solicitors of the lessor and of the liquidators in reference to provision being made by the company for their liability to the lessor under the covenants in the leases, but as the proposition made to him was deemed to be not satisfactory, he in July, 1876, commenced this action, claiming a declaration that the liability of the company to him under the leases and under the memorandum of agreement ought to be properly provided for before any further distribution of the property of the company amongst the shareholders, and that proper orders and directions might be given for that purpose; and asking for an injunction against all the defendants. An injunction was moved for, but, the company undertaking to set apart a certain sum to meet their liabilities, an inquiry was directed to be made in chambers as to what those liabilities were, and how they ought to be provided for. The Chief

Clerk had certified as to the terms and conditions of and in the leases, and that the liabilities ought to be provided for by setting apart the estimated sum of £12,000 to make good any amount by which the actual rent of the premises during the terms of the leases might fall short of the amount of rent which would become payable by the company.

The plaintiff having applied by summons to vary the certificate, on the ground, mainly, that he was entitled to have the whole future rent provided for, and not merely an estimated probable deficiency, the summons was adjourned into court.

Dickinson, Q.C., and *Rendall*, for the plaintiff: The certificate is objectionable because it does not provide for a sufficient indemnity. There ought to be a money provision made sufficient for the payment of all rent in future. The question arises upon the construction of sect. 158 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which enacts that "in the event of any company being wound up under this act all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate 746] *being made, so far as is possible, of the value of all such debts or claims, as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value;" and it is submitted that the plaintiff is entitled to have an indemnity for the whole of the future rent. The case of *In re Westbourne Grove Drapery Company* (1) may be referred to, but that case is distinguishable from the present.

Hastings, Q.C., and *Speed*, for the defendants: The question is entirely one as to the construction of the 158th section. But for that section the plaintiff would have no *locus standi*. Where all the rent due to the present time has been paid, and no suggestion is made that there has been a breach of covenant, how can it be contended that this is anything more within the meaning of the section than a contingent claim, which must be estimated? The plaintiff, however, is attempting to have the amount of rent multiplied by the number of years yet to run, and to have that sum set apart and impounded as the estimated value; but that, it is submitted, cannot be the correct view of the law which has been settled in the cases of *In re Westbourne Grove Drapery Company*; *In re Gartness Iron Com-*

(1) 5 Ch. D., 248; 22 Eng. R., 60.

pany (¹); *In re Telegraph Construction Company* (²); *In re Haytor Granite Company* (³); and *Yelland's Case* (⁴).

HALL, V.C.: The question which has arisen is a very important one no doubt, but I am more embarrassed by the expressions which are to be found in the judgments of the cases which have been referred to than by any great difficulty in this case. The 158th section of the Companies Act, 1862, enacts that "all claims against the company, present or future, certain or contingent . . . shall be admissible to proof" against the company. Now, rent which will accrue under covenants which have been entered into by the company, though payable at future times, is a claim of a certain ascertained amount. The section proceeds to enact, "a just estimate being made, so far as is possible, of the value of all such * . . . claims as may be subject [747 to any contingency . . . or for some other reason do not bear a certain value." It seems to me that rent is a sum which does bear a certain value, therefore the latter branch of the section is applicable only where the claim is incapable of bearing a certain value. Rent is not payable as a debt or a claim subject to a contingency; and because there is another remedy for payment, viz., by distress, its value is not made less certain. It appears to me, therefore, that the plaintiff is entitled to claim for the full amount, and to have a sum provided to meet it, less only such a sum as, when the whole has been set apart and invested, and is yielding income, will be necessary to make up the full amount. As regards the cases which have been referred to, I find the word "contingency" occurs in several of them, and the use of it creates some difficulty; but I cannot consider that the learned judges used that expression in the sense that a valuation or estimate must be made of the amount of the claim; taking into consideration that the whole or part of the rent may be paid by the person who is sub-lessee, and between whom and the lessor there may possibly be no privity. I cannot conceive that was meant. On the contrary, when Lord Justice Turner, in *In re Haytor Granite Company* (³), spoke of the liability under the covenant being estimated, and when Vice-Chancellor James, in *In re Telegraph Construction Company* (²), referred to the lessors having a claim which might become payable at a future day, they meant that the lessors in each case were to have a sum set apart which would completely indemnify them. That, at any rate, is the spirit of the judgment of Vice-Chancellor James.

(¹) Law Rep., 10 Eq., 412.

(²) Law Rep., 10 Eq., 384.

(³) Law Rep., 1 Ch., 77.

(⁴) Law Rep., 4 Eq., 350.

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Harris v. Gamble.

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I therefore consider that it will not be necessary to do more than to direct that there shall be set apart such a sum, to be estimated, as will, when invested with half yearly rests at 3 per cent.—taking consols at their present price—yield such a sum as will be a complete indemnity as between the lessor and the company, by producing the amount of the annual rent. The certificate of the Chief Clerk must, therefore, be varied to that extent, and the defendants must pay the costs of the application.

Solicitors: *Pilgrim & Phillips; Dawes & Sons.*

[6 Chancery Division, 748.]

V.C.H., June 7, 9, 1877.

748]

*HARRIS V. GAMBLE.

[1877 H. 97.]

Practice—Counter-claim—Judicature Act, 1873, s. 24, subs. 3—Rules of Court, 1875, Orders XIX, r. 3; XXII, rr. 5, 9; XXVII, r. 1.

A counter-claim must claim relief against the plaintiff, and he must be made a party to it. The relief claimed by a counter-claim must relate to the specific subject-matter of the action.

Where a counter-claim sought indemnity:

Held, that the indemnity must be confined to the specific property which was the subject of the action.

Shepherd v. Beane ⁽¹⁾ observed upon.

THE plaintiffs, J. Harris, T. Cooper, and A. G. Harris, in their statement of claim, alleged that by an agreement in writing dated the 21st of October, 1876, the defendant Gamble contracted to purchase from them two farms in the county of Southampton, with the crops and stock thereon, for £24,000, £2,400 of which was to be paid as a deposit upon the execution of the contract, whereupon Gamble was to be let into possession of, and to be at liberty to work the farms, and to sell the crops and stock thereon; and the purchase was to be completed on the 23d of December, 1876. That Gamble paid the deposit of £2,400, took possession of the farms, and accepted the title thereto, but was not ready to complete on the day fixed. That the time was extended to the 7th of March, 1877, when Gamble again failed to complete, and his solicitor informed the plaintiffs, in a letter of that date, that by an indenture of assignment, dated the 30th of October, 1876, made between Gamble of the first part, the Real Property Trust Company (hereafter called the Trust Company) of the second part, and James Beal of

(¹) 2 Ch. D., 223.

the third part, Gamble had assigned to Beal, as trustee for the Trust Company, all his interest under the agreement of the 21st of October, 1876, for the purpose of securing to the Trust Company the sum of £2,400 and interest, which they had advanced to Gamble in order to enable him to pay the deposit under his contract. That Beal, as trustee for the Trust Company, took possession *of the farm im- [749 mediately after the assignment by Gamble to him, and had since then worked the farms and sold the crops, and that the Trust Company had received the proceeds. That the Trust Company and Beal refused to deliver up possession, and that the Trust Company claimed a lien on the premises for the £2,400 they had advanced, and for other moneys expended. The plaintiffs made Gamble, the Trust Company, and Beal defendants to their action, and claimed specific performance, a declaration of lien in their favor for the balance of the purchase-money, a decree for payment by the defendants or some of them, and in default a sale of the farms and payment to plaintiffs of the proceeds; that unless the purchase-money, interest, and costs should be paid, the Trust Company and Beal should deliver up possession, paying an occupation rent; and for a receiver and damages or compensation.

Beal then delivered a pleading intituled in the original action, and also between himself as plaintiff and the Trust Company as defendants by counter-claim, and headed "Statement of defence and counter-claim," in which, after disclaiming knowledge of the transactions between the plaintiffs and Gamble, and submitting to act as the court directed, he alleged, by way of counter-claim, that he had acted as agent for the Trust Company in negotiating the terms of the advance of the £2,400 to Gamble, and in reporting upon the value of the stock; that by an indenture dated the 25th of October, 1876, Gamble, by the direction of the Trust Company assigned to him (Beal) the benefit of the agreement of the 21st of October, 1876, upon trust to take possession of the farms, stock, and crops, and sell the same, working the farms until sale, and to hold the proceeds of any sales upon trust to pay the Trust Company all sums which might be advanced by them to or on account of Gamble, either for the deposit, or on completion of the contract, or for working the farms, with interest; and subject thereto in trust for Gamble; that it was a term of the advance of the £2,400 to Gamble that Gamble should give bills of exchange for the amount; and that at the request of the chairman of the Trust Company, and in order to facilitate the discounting of

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such bills, though without the idea of incurring any liability to the company, he, Beal, had accepted two bills of exchange drawn by Gamble, payable at six months' date, for 750] the aggregate amount of £2,400, and *interest at 12 per cent.; that these bills were handed to the Trust Company, discounted by them, and subsequently presented at Beal's bankers for payment, and by them, at his direction, dishonored and referred to the Trust Company; and that the Trust Company were indebted to him for having valued the stock on the farms; and that he had also incurred costs and expenses in working and endeavoring to sell the farms. Beal then claimed to be indemnified by the Trust Company against the amount of the two bills, and all costs and expenses in respect thereof; to be paid by the Trust Company the amounts due to him, and all costs and expenses in the execution of the trust of the indenture of the 25th of October, 1876; and to be indemnified by the Trust Company against all sums which might be recovered against him by the plaintiffs in this action by way of occupation rent, damages, costs, or otherwise.

The plaintiffs in the action and the defendants the Trust Company now each moved under the Rules of Court, 1875, Order xxii, r. 9, and Order xxvii, r. 1, to have this counter-claim struck out or excluded.

Hastings, Q.C., and *MacSwinney*, for the defendants, the Trust Company: This so-called counter-claim is wrong both in form and substance. It seeks no cross relief against the plaintiffs, and they are in no way interested in it: *Furness v. Booth* (¹); *Warner v. Twining* (²).

This action is one for specific performance, in which the plaintiffs seek to enforce a contract between themselves and Gamble, and the relief sought by this pleading does not specifically relate to, nor is it sufficiently connected with, the subject-matter of the action: *Padwick v. Scott* (³). The defendants the Trust Company having lent their money, are as much entitled to have the simple question tried as the plaintiffs, and the settlement of that question ought not to be delayed and embarrassed by the working out of the question as to indemnity between the co-defendants Beal and the company. *Vide* the observations of Lord Justice 751] Mellish, in **Treleaven v. Bray* (⁴), cited in *Padwick v. Scott* (⁵). We are entitled to have this pleading excluded or struck out, both as a claim which ought not to be dis-

(¹) 4 Ch. D., 586; 20 Eng. R., 775.

(²) 24 W. R., 536.

(³) 2 Ch. D., 736.

(⁴) 45 L. J. (Ch.), 113.

(⁵) 2 Ch. D., 740.

posed of by way of counter-claim under Order xxii, r. 9, and as a pleading tending to embarrass or delay the fair trial of the action under Order xxvii, r. 1.

Shephard v. Beane (*), which may be cited on the other side, was not a case decided upon argument, nor is it, in fact, any authority against our contention.

HALL, V.C.: That was an irregular application for the direction of the court, which perhaps ought not to have been entertained.

Dunning, for the plaintiffs: The plaintiffs are not named as parties to this pleading, which is solely between the defendants Beal and the Trust Company; and to constitute a counter-claim, relief must be prayed against the plaintiff: Judicature Act, 1873, sect. 24, subs. 3; Rules of Court, 1875, Orders xix, rr. 2, 3; xxii, rr. 5, 9. The defendants the Trust Company and Beal were properly made co-defendants with Gamble, and relief sought against them: *Aberaman Ironworks v. Wickens* (*). There is no case in which, under the new practice, a plaintiff has been made to wait for relief while questions of indemnity between co-defendants are being worked out.

Karslake, Q.C., and *Thurstan Holland*, for the defendant Beal: The only objection to this pleading appears to be that the word "counter-claim" is used in it; and that does not invalidate it. It is a perfectly good pleading, and the case it makes could have been well pleaded in an answer under the old practice. The plaintiffs' own statement of claim shows the connection of Beal's claim with the subject-matter of the action. If the judgment is for specific performance, then, under the indenture of the 25th of October, 1876, Beal would be entitled to a conveyance of the property, or, if a sale is directed, to the proceeds, subject to the vendor's lien. So that the form of the decree could not be settled until the *rights set up by the counter-claim [752 are decided, and there is a sufficient claim against the plaintiffs under the prayer in the counter-claim for general relief.

Hastings, in reply, for the Trust Company: The counter-claim does not pray for any conveyance to Beal, nor is he entitled to a conveyance as of right; his rights do not depend upon the establishment of the plaintiffs' rights, and he could have relief against the company in an independent action without making the plaintiffs parties.

Dunning, in reply, for the plaintiffs.

HALL, V.C.: I think that there may be some substance in this so-called counter-claim, but that it is wrongly in-

(*) 2 Ch. D., 223.

23 ENG. REP.

(*) Law Rep., 4 Ch., 101.

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titled, inasmuch as the plaintiffs in the action have not been made parties to the counter-claim. I shall accordingly give the defendant Beal leave to amend his pleading by making the plaintiffs and Gamble parties to the counter-claim, by introducing into it a claim (in case of specific performance being granted) to have the conveyance made, or the proceeds of the property paid, to him, and by striking out so much of the counter-claim as does not relate to the specific property which is the subject-matter of the action. The amended counter-claim must be delivered within a week, and the plaintiffs and the defendants will have two weeks from the delivery of the amended counter-claim to proceed with their next step in the action. The costs of these motions will be costs in the cause.

I may add that I consider that *Shephard v. Beane* (1) ought not to be cited as an authority.

Solicitors: *J. & R. Gole*, agents for *Oxley & Pashley*, Rotherham; *Walker, Twyford & Belward*; *E. A. Dow*.

(1) 2 Ch. D., 223.

[6 Chancery Division, 753.]

Fry, J., July 10, 1877.

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*CROWE V. BARNICOT.

[1876 C. 205.]

Pleading—Counter-claim—Specific Statement of Facts relied on—Rules of Court, 1875, Order XIX, rr. 3, 4, 10—Forms (Appendix C), Nos. 10, 14, 24.

A counter-claim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed.

It is not sufficient that the facts relied upon appear in the statement of defence, even though that and the counter-claim form one continuous document.

A counter-claim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused.

THIS was an action by lessors to recover possession of leasehold premises by reason of the breach of a covenant to repair, and for damages.

On the 5th of July, 1858, Alice Crowe demised the premises in question, which consisted of a dwelling house, with a cart house and stables, sheds, workshops, premises, and garden attached thereto, to Thomas Johnston, for 27½ years from the 24th of June, 1858, less ten days. The lease contained a covenant by the lessee that he, his executors, administrators, and assigns, would at all times during the term well and sufficiently repair, uphold, amend, and keep the premises, and surrender the same in good repair and

condition at the end of the term, and would not during the term assign or underlet the premises without the consent in writing of the lessor, her executors, administrators, or assigns, first obtained. There was a proviso for re-entry by the lessor in case of non-payment of the rent, or breach of any of the covenants. The reversion subject to the lease became vested in the plaintiffs. The defendants Barnicot and Isitt were assignees of the term. On the 9th of May, 1876, they agreed to underlet the premises to the defendant Timewell, subject to their obtaining the consent of the plaintiffs to the underlease. Before this consent had been obtained, Timewell, without the knowledge or authority of Barnicot and Isitt, obtained possession of the premises, pulled down the greater portion of the buildings other than the dwelling house, and commenced erecting a skating rink on the ground. *As soon as the plaintiffs became [754 aware of what Timewell was doing they commenced this action against him and Barnicot and Isitt, claiming possession of the demised premises, payment by Barnicot and Isitt of the arrears of rent, £3,000 damages from Barnicot and Isitt for breach of the covenant to repair and uphold, and an injunction to restrain Timewell from doing anything or permitting anything to be done on the demised premises inconsistent with the terms of the lease until the recovery of possession by the plaintiffs.

Soon after the action was commenced Vice-Chancellor Malins granted an interlocutory injunction against Timewell.

On the 5th of December, 1876, Timewell delivered a defence and counter-claim, which was headed "Statement of defence and counter-claim of the defendant A. T. Timewell." It consisted of fourteen paragraphs, numbered consecutively. The first thirteen paragraphs contained a statement of the facts on which the defendant relied by way of defence, but made no reference to a counter-claim. Among other things there was a statement that the defendant had entered into a contract for the erection of iron buildings on the demised premises at a cost of £1,500, and that he had already laid out £500 on the premises.

Paragraph 14 followed immediately after paragraph 13, without any distinction, and was in these words: "This defendant, by way of counter-claim, claims to be paid by the plaintiffs and the defendants Barnicot and Isitt damages for the loss he has sustained in consequence of his expenditure aforesaid upon the said premises to the amount of £1,500, and he claims interest on such sum."

The defendants Barnicot and Isitt, on the 5th of January, 1877, delivered a reply to the counter-claim of Timewell, by which they, in the first place, submitted "that the claim made against them by the defendant Timewell is not the proper subject of a counter-claim in this action, and that no relief against them can be adjudged to the defendant Timewell on such counter-claim." They then, "subject and without prejudice to the said objection," traversed some of the facts stated in the defence and counter-claim, and in other respects they joined issue on the statement of defence and counter-claim of Timewell.

755] *This was the trial of the action.

Cookson, Q.C., and E. J. Foster, for the plaintiffs.

Fischer, Q.C., and Freeling, for the defendants Barnicot and Isitt.

North, Q.C., and E. Clarke, for the defendant Timewell.

Before the conclusion of the argument the plaintiffs' counsel expressed their willingness to waive the forfeiture (if they had a right to insist on it) and to accept a judgment that the premises should be reinstated. The counsel for Barnicot and Isitt consented to this.

FRY, J., accordingly gave judgment that the defendants Barnicot and Isitt should reinstate the premises in the same condition in which they were before the acts of Timewell. The work to be completed within six months, and to the satisfaction of a surveyor to be agreed on by the parties, or to be named by the court. The defendants to pay the rent up to the present time. And as to Timewell, he had acted most improperly. He was a mere wrongdoer. A perpetual injunction must be granted against him. The plaintiffs' costs of the action must be paid by the defendants.

North, Q.C., for Timewell, then opened the counter-claim against Barnicot and Isitt, abandoning it against the plaintiffs.

[FRY, J.: The counter-claim is against Barnicot and Isitt and the plaintiffs jointly. If you abandon it as against the plaintiffs, does it not follow that you abandon it against Barnicot and Isitt also?]

Freeling, for Barnicot and Isitt, took the preliminary objection that there was no statement of facts to support the counter-claim: Rules of Court, 1875, Order XIX, r. 10; Forms (Appendix C), Nos. 10, 14. The counter-claim does not even refer to the facts which appear in the statement of defence. The counter-claim ought itself to contain a specific statement of the facts relied upon. If the defendant does

rely upon any facts, he has not stated them ; if he does not rely on any facts, he is clearly out of court.

**North*, Q.C., for Timewell: The defence and [756 counter-claim are one document. It is sufficient to state the facts once. The words "expenditure aforesaid" in the counter-claim refer to what has been already stated in the defence. That is enough. There is no surprise upon the other side, and the object of the rules is only to prevent that. In *Holloway v. York* (¹), the only reported case on the subject, the question was a different one. The rules have never as yet been so strictly construed. The objection ought to have been taken before. Barnicot and Isitt have replied, and in their reply they have treated the document as a counter-claim. They have taken an objection to it, but not this objection. At any rate leave should be given to amend.

FRY, J.: I am of opinion that this preliminary objection is a valid one. It is quite plain that paragraph 14 of the document refers to that which has gone before, and, if you do not read that, you do not know what paragraph 14 means. There can be no doubt that in that paragraph itself there is no specific statement of the facts upon which the defendant relies for the relief which he claims. The rules bearing on the subject are rules 3 and 10 of Order XIX. [His Lordship read them.] The 10th rule, in my opinion, means that the defendant must state specifically in his counter-claim, or, as the Master of the Rolls expressed it in *Holloway v. York*, in the body of the counter-claim, the facts upon which he relies for relief. A counter-claim is intended as a substitute for a cross bill, and therefore the facts upon which reliance is placed should appear in the counter-claim itself. If paragraph 14 alone is looked at, it is not disputed that the facts relied upon do not appear. But it is said that the whole document is a defence and counter-claim, that it is an amalgamation of the two things, that the whole of it must be looked at together. I think that such a mode of pleading is not sanctioned by the rules, and that it would be highly inconvenient. If it were permitted, the result would be that in every case of a counter-claim the pleader would omit to state the specific [757 facts upon which he relies by way of counter-claim, and would take his chance of picking them out of the statement of defence at the trial. I am confirmed in this view by the forms of counter-claim Nos. 10 and 14, contained in Appendix C to the Rules. The forms are not, indeed, intended to be exactly followed in all cases, but they are

(¹) 25 W. R., 627.

intended as guides. In those forms the counter-claim is separated by a marked line from the defence; the facts are stated separately, and the paragraphs are numbered differently. I am of opinion, therefore, that I cannot treat this as a proper counter-claim, and I dismiss it with costs. I cannot allow an amendment. I do not think that any amendment would be likely to result in success, and, under the circumstances, I think that the defendant is not entitled to any indulgence.

Solicitor for plaintiffs: *John Hopgood.*

Solicitors for defendants: *Heather & Sons; Rooks & Co.*

A counter-claim must show clearly the facts which are relied upon in support of it, either in detail or by reference to portions of the defence which, if repeated, would constitute a good pleading by way of counter-claim; but where such facts are set out fully in the statement of defence, there is no inflexible rule requiring that they should be repeated over, *seriatim*, in the counter-claim, and it will be sufficient for a defendant to incorporate these portions of the statement of defence in the counter-claim, and to state that he relies on them by way of counter-claim, provided that no actual embarrassment to the opposite party is occasioned by such a mode of pleading: *Marony v. Guest*, 1 Irish Law Rep., Eq., 564.

In that case the court said (pp. 571-2): "I come now to consider the only question as to which I felt a difficulty in this application, and that only in consequence of the observations of Fry, J., in his judgment in *Crowe v. Barnicot*. I do not mean to express the least dissent from the decision in that case, but it appears that if the language of the learned judge is to be taken as establishing the rule contended for in this case, it would necessitate the statement over again at full length in the counter-claim of all facts already pleaded in the defence, even in cases where the very same facts in themselves constitute the grounds of both defence and counter-claim. * * * In these rules, there is certainly no express requirement that the defendant must set out in the counter-claim, as distinguished from the defence, the statement of all facts necessary to support the counter-claim. They require a defendant to state specifically in his counter-claim

the relief which he claims; and that where he relies upon any facts as supporting his counter-claim, he must in his statement of defence state specifically that he does so by way of counter-claim. * * * But it is said that the whole document is a defence and counter-claim, that it is an amalgamation of the two things, that the whole of it must be looked at together. I think that such a mode of pleading is not sanctioned by the rules, and that it would be highly inconvenient. If it were permitted, the result would be, that in every case of a counter-claim the pleader would omit to state the specific facts upon which he relies by way of counter-claim, and would take his chance of picking them out of the statement of defence at the trial. He therefore dismissed the counter-claim with costs, and refused to allow an amendment. In the principle of the decision I agree, and I should be prepared to hold that a counter-claim must contain within itself sufficient to support it, either by way of statements in detail, or by clear reference to portions of the defence, which if repeated would properly, and without confusion or embarrassment, constitute a good pleading by way of counter-claim. But it appears to me that it would be inconvenient to lay down a rule that, although the defence contains such statements capable of being so referred to, the counter-claim must state them *seriatim* over again. If the defendant, in his statement of defence, properly sets out facts which are sufficient to support a counter-claim, not mixed up with facts which go to constitute the defence only, it is not, in my opinion, necessary to repeat them in the counter-

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claim, nor to do more than refer to them as already pleaded. The court, in considering what is sufficient for a counter-claim, must see that enough to support the counter-claim has been stated in a definite and clear manner, and that the opposite party is not subjected to the inconvenience of picking out from a pleading what the counter-claim is. In the present case the counter-claim refers to and incorporates the statements in the defence; and those statements if repeated in the counter-claim would be quite sufficient to support it, and would not, in my opinion, have been fairly open to objection for irrelevancy, or prolixity, or as tending to prejudice or embarrass the plaintiff."

Not only must each count or cause of action be set out by itself, but it must be perfect and complete in and of itself: *Victory, etc., v. Beecher*, 55 How. Pr., 193; *Nelson v. Swan*, 18 Johns., 483; *Latin v. McCarthy*, 8 Abb., 225, less fully reported 17 How., 239; *Ritchie v. Garrison*, 10 Abb., 246; 1 Abb. Forms of Pleadings, 114, note o; and must not require a reference to other counts to sustain it: *Xenia, etc., v. Lee*, 7 Abb., 372, 2 Bosw., 694; 1 Abb. Forms of Pleadings, 114, note o.

But in order to avoid repetition, allegations of facts which form a part of several causes of action may be once stated, and may thereafter be incorporated in each cause of action by appropriate words of reference, instead of repeating them at length in each: *Xenia, etc., v. Lee*, 7 Abb.,

372, 2 Bosw., 694; *Nestle v. Van Slyck*, 2 Hill, 282; *Loomis v. Swick*, 3 Wendell, 205. But such reference must be clearly and specifically made: *Simmons v. Fairchild*, 42 Barb., 404; *Victory, etc., v. Beecher*, 55 How. Pr., 203; as, for instance, in slander, that the words were spoken of and concerning the plaintiff in his *said* trade and business of a merchant, and of and concerning his *said* books of account, which he, the plaintiff, kept with his customers and others, as such merchant, *as aforesaid*: *Loomis v. Swick*, 3 Wend., 205.

And so as to defences. Each must be complete in itself, without reference to another defence: *Xenia Branch Bank v. Lee*, 2 Bosw., 694, 7 Abb., 372; *Ayres v. Covill*, 18 Barb., 261; *Ritchie v. Garrison*, 10 Abb., 246; *Ayrault v. Chamberlain*, 33 Barb., 230; *Loosey v. Orser*, 4 Bosw., 392; *Baldwin v. U. S. Tel. Co.*, 6 Abb., N.S., 406; 1 Abb. Forms and Pl., 117, note 3. But, in order to avoid repetition, allegations of facts which form a part of several defences may be once stated, and may thereafter be incorporated in each defence by appropriate words of reference, instead of repeating them at length in each: *Xenia, etc., v. Lee*, 2 Bosw., 694, 7 Abb., 372; *Ayrault v. Chamberlain*, 33 Barb., 230; *Loomis v. Swick*, 3 Wend., 205; 1 Abb. Forms and Pl., 117, note 3; but such reference must be clearly and specifically made: *Simmons v. Fairchild*, 42 Barb., 404; *Victory, etc., v. Beecher*, 55 How. Pr., 203.

[6 Chancery Division, 757.]

M.R., June 23, 1876: FRY, J., July 12, 13, 14, 16, 1877.

NATIONAL PROVINCIAL PLATE GLASS INSURANCE COMPANY V. PRUDENTIAL ASSURANCE COMPANY.

[1876 N. 66.]

Ancient Light—Alteration of Plane of Window—Alteration of Shape—Small Injury—Damages or Injunction—2 & 3 Will. 4, c. 71, s. 8.

A building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a skylight:

Held, that the right to access of light was not lost.

Per JESSEL, M.R. (on motion for injunction): Any substantial alteration in the plane of the windows destroys the right.

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Per FRY, J.: The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows.

Considerations on which the question of injunction or damages depends discussed.

THE National Provincial Plate Glass Insurance Company, the plaintiffs in this case, occupied and held leases for long terms of years of No. 66 Ludgate Hill; and the Prudential 758] Assurance Company, *the defendants, were owners of buildings to the east and to the north of the building held by the plaintiffs. In 1870 the plaintiffs rebuilt their premises. They set back the upper floors of the east face of their building about 5 ft. 8 in., the plane of the face of the new building being parallel to that of the old building, and the windows in the new building nearly corresponding with those in the old building. A room on the ground floor of the old building was lighted by a dormer window of three faces, light to which came from an opening or well-hole between the building of the plaintiffs and that of the defendants. The ground floor of the new building was the same as in the old building, but instead of the dormer window, the plaintiffs put a skylight partially coextensive with the old window though of a different shape; and this alteration was made in order to comply with certain provisions of the Metropolitan Building Acts.

In 1876 the defendants began to rebuild their premises, and had partially rebuilt them, when the plaintiffs brought this action, alleging that access of light to the windows on the east face of their building, and to the room on the ground floor was already obstructed by what had been built, and that the erection of the new building to the height proposed would be an invasion of the plaintiffs' right to access of light, and most prejudicial to the enjoyment of their premises, and the plaintiffs claimed an injunction and damages.

On the 23d of June, 1876, the plaintiffs moved before the Master of the Rolls for an injunction, which his Lordship refused to grant on an interlocutory application.

JESSEL, M.R., after stating what were the facts of the case upon the evidence before him, continued:

The first point to be decided is a question of law as regards those windows, which are not in the same plane as the old windows, but are further back in a parallel plane. Are those windows protected absolutely? In my opinion they are not. So far as I am aware, there is no decision exactly on the question, and therefore I am bound to give my opinion. I do not mean to say that I should have been

of the same opinion if the difference had been *a few [759 inches or a few minutes of a degree or perhaps a degree. I think the old maxim, *de minimis non curat lex*, would apply to these cases as to all others. But when the building is substantially a new house, placed at a very considerable distance from the old house, of a different shape, and, in my opinion, a new house substantially, I think I cannot say that the access and use of light has been enjoyed with that house, though it may have been enjoyed with an ancient house which stood in a different position. I do not forget that in the case of *Tapling v. Jones* (*) Lord Westbury read the section as if instead of the words "access of light," there was the word "windows," and as if the enactment was, "when any window of a dwelling house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible." In the present case the windows are not the same, nor is it the same dwelling house.

I agree that if the plaintiffs had rebuilt the house and put the windows in the same positions, it would for this purpose have been the same house. But where they have built a new house in a different position a considerable distance from the old house, and have put new windows into it, the mere fact that those windows are in a parallel plane at a greater distance, or in diagonal planes at a similar distance, does not make them the same windows within the act. I think, therefore, that whether the plaintiffs can or cannot now restore the house or the windows, the windows are not at present within the provisions of the act.

I now come to consider the skylight; I am not prepared to say that the case of the skylight is by any means so clear. It is to be observed that, subject to the question of enlargement, the decision in *Tapling v. Jones* is not decisive on the question. The aperture by which the light is admitted through the ceiling of the rooms on the ground floor is in the same place as the old aperture, and the room is the same, so that we have for that purpose not altogether a new dwelling house, and I am not prepared to say that if the aperture remains the same, the mere fact that the old aperture was covered by glass in a different direction ought to affect the question of access of light. If, for instance, there *was a square aperture in the side of the room [760 which was covered over by a projecting shield, and was a window in the sense that there were sides to the shield as

(*) 11 H. L. C., 290.

well as a front, so that it was not a flat series of panes of glass but a bow, and the bow was removed and replaced by flat glass, I for one should not hold that the right to access of light through the old aperture was thereby lost. Similar considerations appear to me to apply to the case of taking away a top skylight with lights either by lateral or diagonal planes, or by a combination of the two, provided that the aperture which admitted the light remains unaltered, and the only claim is to access of light by that aperture; that, I think, may still be called the same window.

The next question is, whether the mere enlargement will be sufficient to destroy the right; but it was decided in *Chandler v. Thompson* (¹), before *Tapling v. Jones* (²), that there might be an action for a nuisance by obstruction to an ancient window although the window had been enlarged. That was the decision of Mr. Justice Le Blanc, and though it may be considered as overruled by *Renshaw v. Bean* (³), yet that again was overruled by *Tapling v. Jones*, in which it was held to be not necessary actually to restore the window if the old window substantially remained.

But still there remains the question whether, though you have left the room unaltered, if you alter the access of light to that room, you can say that the access of light is still enjoyed with the dwelling house, workshop, or other building. That is a serious question, depending upon whether there has been such a substantial change in the building as will amount to an abandonment of the right. In this particular instance, so far as the evidence at present goes, it appears to me that there is no evidence of such a change. The alteration of the skylight was made, not with the intention of altering the access of light, but to comply with the regulations of the Building Acts. Therefore, as far as the evidence goes, it appears to me that there has been no alteration with any intention of abandonment of right, and I am not prepared to say that if in altering other parts of the house some of the ancient rooms with their ancient windows 761] are kept intact, there is not an *access of light to a building within the meaning of the 3d section of the act, although it may not be access of light to the whole dwelling because other parts have been altered. It seems to me, therefore, that as far as the skylight is concerned, and without pledging myself to that as the final decision, this skylight would be protected as being substantially the old aperture, and as not being a light abandoned when the house was reconstructed.

(¹) 3 Camp., 80.

(²) 11 H. L. C., 290.

(³) 18 Q. B., 112.

Then it may be said, why do I not grant an injunction? I have already said that I think material injury to that light has taken place, but I am not prepared to say that the carrying up of the building to a greater height at the same angle will materially interfere with it. But that is not my only reason. It must not be forgotten that there are other considerations which may weigh with the court at the hearing. In the first place, there was an absolute power given to the court by 21 & 22 Vict. c. 27, s. 2, in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages in addition to or in substitution for such injunction. It must not be forgotten that Vice-Chancellor Kindersley, in *Curriers' Company v. Corbett* (¹), in dealing with the provisions of that statute, said that the fact of the building being completed before the injunction was asked for gave rise to a question whether an injunction ought to be granted. I myself have said so in more than one case before me. That applies to the actual obstruction caused by the present building as it now stands. There is another consideration which ought to have weight, as stated by that learned Vice-Chancellor, and that is the comparative injury caused in point of value and damage to each party as regards the removing the obstruction, that is, by destroying the new building with a view to restore the enjoyment of light. It appears to me that the injury to the defendants will be out of all comparison to the injury to the plaintiffs as regards the obstruction to that skylight and to the room on the ground floor.

Upon these grounds, quite independently of the question of law, as at present advised, and though I think the plaintiffs *right as regards the skylight, I should hesitate [762 long before I ordered the destruction of this new building, or its being removed for the sake of preventing injury to the plaintiffs' light. I have not heard the case out, and I do not know of what material importance this room may be to the plaintiffs, or to what extent any injury to their light may be remedied by artificial light or otherwise, which I shall probably learn at the hearing. But, having regard to all the circumstances, I think, the defendants giving an undertaking to pull down anything they may build, the right thing will be to make no further order on the motion except that the costs be costs in the action.

(¹) 2 Dr. & Sm., 355, 360.

The action came on for trial before Mr. Justice Fry on the 12th of July, 1877. Witnesses were examined on both sides, and his Lordship came to the conclusion that as to the windows on the east side the plaintiffs had not shown that the access of light would be materially affected; and that the access of light to the ground floor would be affected only by a party-wall which, before the action was begun, had been built and raised about five feet higher than the former wall. The remaining questions were, whether the plaintiffs' rights were lost by the alteration of the window on the ground floor from a dormer window to a skylight as above mentioned; and whether damages or an injunction should be awarded. The facts on which the last question depended are stated in the judgment.

Bagshawe, Q.C., *A. L. Smith*, and *Cozens-Hardy*, for the plaintiffs: The change of plane of the windows cannot affect the right of access to light, and the dominant tenement has a right to as much light as would pass through the projection of the old window on the plane of the new window. If it was not so, the smallest alteration in the plane of a window in rebuilding would destroy the right. The plaintiffs have a right to as much light as passed over the old buildings of the defendants into the old window of the plaintiffs, and the change does not destroy that 763] *right: *Luttrell's Case* ('); *Gale on Easements* ('); *Bazendale v. McMurray* ('); *Wood v. Saunders* ('); *Hale v. Oldroyd* (').

Cookson, Q.C., *Phear*, and *Harben*, for the defendants: There is no such thing as property in light, and the plaintiffs cannot say they have a right to certain specific rays. If so, they would have a right to preserve light passing through an internal window, but no such claim has ever been thought of. They have chosen to alter their window entirely, and have abandoned what rights they had: *Blanchard v. Bridges* ('). They have a right only to the light as it passed through the original aperture. No doubt the fiction of a presumed grant is done away with by the statute 2 & 3 Will. 4, c. 71, s. 3, but the same principles still apply. *Renshaw v. Bean* (') was a departure from the old principle: *Jackson v. Duke of Newcastle* ('); *Tapling v. Jones* ('). The plaintiffs have chosen to alter their window, and to make

(1) 4 Rep., 84 b.

(2) 5th ed., p. 330.

(3) Law Rep., 2 Ch., 790.

(4) Law Rep., 10 Ch., 582; 14 Eng. R., 805.

(5) 14 M. & W., 789.

(6) 4 A. & E., 176.

(7) 18 Q. B., 112.

(8) 3 D. J. & S., 275.

(9) 11 H. L. C., 290.

it impossible for the court to say what is the effect of the alteration, and they must take the consequences. At all events there can be no injunction granted, and the plaintiffs can have only damages: *Smith v. Smith* (¹); *Staight v. Burn* (²); *Kelk v. Pearson* (³); *Isenberg v. East India House Estate Company* (⁴). The light they had before was very small, and we have taken away but a small part of that, not as in *Dyers' Company v. King* (⁵). Moreover, the wall of which they complain was built before the action was begun, and they can, therefore, have only damages at the utmost.

Bawshawe, in reply.

FRY, J., after stating the facts of the case, and that it had not been shown that the access of light to the east windows would be affected, and that the building of a certain bow window would not affect the access of light to the ground floor, but that the raising *of the party- [764 wall had affected the access of light to the ground floor, continued :

The case, therefore, resolves itself into a question as to the effect of the party-wall upon the window on the ground floor, with regard to which various points have been suggested in argument. In the first place, it is said that the change which the plaintiffs have themselves effected in the mode of lighting their ground floor deprives them of any right under the statute. It is said that the aperture must be the same, or, to use the proposition put forward by Mr. Cookson, it must be the same in every respect except extension in the same plane as the original window—that concession being necessary in consequence of the decision in *Tapling v. Jones* (⁶).

Now the words of the statute which regulate this matter (2 & 3 Will. 4, c. 71, s. 3) are, "That when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible."

I understood it to have been suggested in argument that the house must be the same, but if that argument be urged, I am prepared to hold that it is not tenable, and that the house need not be identical in every respect. We are not to be involved in those delicate questions of identity of

(¹) Law Rep., 20 Eq., 500.

(²) Law Rep., 5 Ch., 163.

(³) Law Rep., 6 Ch., 809.

(⁴) 3 D. J. & S., 263.

(⁵) Law Rep., 9 Eq., 438.

(⁶) 11 H. L. C., 290.

structure which puzzled the Athenians with regard to their sacred *trireme*, or which are said to have been raised with regard to a knife. It is enough, as it seems to me, if the house be for practical purposes the same house, and this house standing upon the old foundations is, in my opinion, the same house, if it be necessary that the house shall be the same in order to bring the case within the statute. But I am not convinced even of that. In my view, the conversion of a dwelling house into a workshop or other building would not deprive the workshop or other building of its right to the access of light which the dwelling house had enjoyed. However, the point does not appear to me necessary for decision in the present case.

The next question which arises on the statute is this: It is said that the access of light to the dwelling house must be 765] identical, *and that the right claimed and the enjoyment which has existed must be of access of light through identical apertures. Now in its breadth that proposition is not true, because the case of *Tapling v. Jones* ⁽¹⁾ has shown that you may destroy the identical aperture by taking away the surrounding lines of that aperture and yet leave your right to light intact. Furthermore, I find nothing whatever in the statute which refers expressly to a window or aperture. I find in the statute a reference to the access of light; and in my view the access of light might be described as being the freedom with which light may pass through a certain space over the servient tenement; and it appears to me that, wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement. I come to that conclusion for this reason—that you do not want a statute to give you a right of access in your own premises to light through your own aperture. The statute is wanted to assure your right in the space over the servient tenement.

But then it is said that the cases have to a large extent proceeded upon the form and size of the aperture or window; and that is perfectly true, because, of course, the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement. It is for that reason that in all the cases the court has had regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the

(¹) 11 H. L. C., 290.

dominant tenement. It is said that that conclusion is inconsistent with the definition given by Lord Westbury in *Tapling v. Jones* (¹), but in my opinion that is not so; and Lord Westbury, in referring to a window as equivalent to an access, only means that the window in effect defines the access. And that that was the view taken by the House of Lords seems to me confirmed by a passage in the judgment of Lord Chelmsford, in which he says (¹): "By the Prescription Act then, after twenty years' user of the lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining *owner in [766 the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted." In other words, he seems to me to say that the aperture through which the access of light has been admitted is the measure of the access which is to be enjoyed over the servient tenement.

This case seems to me to illustrate the propriety of not introducing into the construction of the statute any questions with regard to aperture, opening, or window, except so far as the statute itself introduces them. For instance, in the present case no less than three openings have been suggested as being the decisive or dominant openings to which regard must be had. In the first place, there is a suggestion, which I believe I threw out, that the interstice between the sides of the wall and the overhanging top and bottom where the dormer was situated, might itself be the opening, because I conceive there can be no doubt that by a grant of the house that space would pass, and you have therefore a confined opening from the adjoining premises into what in law is the plaintiffs' house. The second, which is that on which the plaintiffs mainly relied, was that the dormer window, consisting of glass arranged in three distinct planes, was itself the aperture to which regard must be had. The Master of the Rolls, in his judgment on the interlocutory application, seems to have been inclined to a third view, that the aperture to which you must have regard was the opening in the ceiling in the plaintiffs' room through which the light found its way from the dormer into the plaintiffs' room. But it seems to me not necessary to determine any of these questions. If that dormer window had for twenty years received light passing through a space over the defendants' premises, any aperture which the plaintiffs may be

(¹) 11 H. L. C., 290, 306.

(¹) 11 H. L. C., 818.

mind to use, and which lets in any portion of the light passing through that same space, is protected by the act—it is the same access to the same dwelling house. When you have those circumstances it seems to me you have all that the act requires.

But then it is said that the case of *Blanchard v. Bridges* (') 767] is *an authority for the proposition that a change in the plane of the window puts an end to the right under the statute, although a change of the aperture by expansion in the same plane would not put an end to that right. Now, such a conclusion seems to me one to which the courts ought not to come, if they can help it. I am at a loss to see why putting back a window which has enjoyed light for twenty years, supposing the planes of the windows to be parallel, should effect an absolute surrender of the right which but for the putting back would have existed. Such a conclusion seems to me to have no reason or common sense to support it. And if putting back in a parallel plane will not work a forfeiture of the right, why does putting back the front at an angle with the original plane do so? I confess that I see no reason for the proposition. However, it is said that *Blanchard v. Bridges* (') is an authority to bind me, whether I see or do not see the reason for it. That case appears to me to have proceeded upon this: there was that which the court held amounted to an implied grant of a right to have certain windows, and an implied license or covenant not to abstract the access of light to those windows; and the whole question was, what was the extent to which that implied grant, license, or covenant went? The facts were shortly these: The plaintiff had been allowed to erect windows looking east in his building or cottage; he then built out a projection five feet from the original house, two bays looking north and south, and also more or less east, and the question was, whether the original grant, license, or covenant was to be deemed to protect these new windows. The court held it was not. It was a mere question how far the implied grant, license, or covenant was to be deemed to have gone. The court says (') that a person might well acquiesce in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, but that to hold him to be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented if it had come in the first instance, would be a great hardship. Therefore I do not think that case to be a binding authority for

(') 4 A. & E., 176.

(') 4 A. & E., 191.

the purpose for which it has been used before me; and I hold, in the present *case, that there has been for [768 twenty years an access of light to the plaintiffs' dwelling house through a portion of space over the defendants' tenement, which reached the ground floor of the plaintiffs' house, and a portion of which, if not the whole, still reaches the same tenement of the plaintiffs through an aperture. I have said that it does not appear to me to be necessary to determine whether the aperture be or be not the same. Further than that, if I am wrong in the conclusion that the aperture need not be the same, I yet think that in this case I ought to hold that as to so much of the new aperture as does let through the old light, it ought to be deemed the same aperture.

That being so, I next come to the material question, whether the defendants by their buildings have or have not stopped so much of the light which I have held to be privileged, as materially to affect the beneficial enjoyment of the plaintiffs' premises, and as to entitle the plaintiffs to a substantial or considerable sum by way of damages. The defendants have asked my attention to several points bearing upon this question. They have said, and said truly, that the privileged light is only a portion of the light which now finds its way through the entire skylight.

[His Lordship then stated that on the evidence he had come to the conclusion that the raising of the party-wall in very close proximity to the privileged part of the skylight had diminished the very small amount of light which previously come into the room, and that considerable damages ought to be awarded in respect of that interception of the privileged light. Then came the question whether an injunction ought to be granted or damages ought to be awarded in lieu of an injunction, and in his Lordship's opinion there had been such delay on the part of the plaintiffs in asserting their right as might not of itself be fatal to their obtaining an injunction, but must be considered. His Lordship then continued:]

Beyond that I must consider what the Master of the Rolls has called the materiality of the injury done to the plaintiffs. Now by that expression the Master of the Rolls, in *Smith v. Smith* (¹), meant something more than a question of whether there was a material injury which would give him jurisdiction *to grant an injunction, because if there were [769 not that material injury no question could arise between injunction and damages as alternatives. Having regard, then,

(¹) Law Rep., 20 Eq., 500, 505.

to the materiality of the injury here, I think it is not very serious. I think that a dark room will be made a little darker, in fact so much darker that damages would have been given to the extent of £100 or £200, or possibly even more; but that the damage will not be such as to affect seriously the occupation of the plaintiffs' house by the plaintiffs. Further than that, I think I am at liberty to have regard to the whole scheme of the defendants, and I find that this injury done to the plaintiffs is done by an integral part of a very important building scheme, the other part of which will not result in damage to the plaintiffs. I am also of opinion that a portion of the defendants' building scheme actually enures to the benefit of the plaintiffs, because the substitution of a building to the north-east of the plaintiffs for the screen, which was nearer to them, actually conferred a benefit on the plaintiffs. Now, although I am not at liberty to hold the injury compensated for by the benefit, yet in deciding the questions of damages or of injunction, I am at liberty to consider it as one element which has to influence my discretion in deciding which of the two alternatives, injunction or damages, I shall adopt.

Considering, then, as I said, the course which the plaintiffs have pursued, and the general circumstances of the case, including the nature of the defendants' building scheme and the materiality of the injury done to the plaintiffs, I think myself at liberty to refuse, and I think that I shall do that which is most right between the parties by refusing a mandatory injunction and by assessing damages in lieu of it, and accordingly I assess the damages at the sum of £200.

Then arises the question with regard to costs. As a general rule, from which I believe I have as yet only departed in one case, costs should follow the event. But in this case I am not at liberty to exclude from consideration the fact that the plaintiffs have put their case far too high. Whether they by their original claim claimed relief in respect of the structure to the north-east is not perhaps very apparent on the pleadings, but the plaintiffs have taken that view, be-
770] cause they have opened that case at the *bar. With regard to that and the bay, I think the plaintiffs were wrong in their contention. I think that it is far from certain that if the plaintiffs had confined their case to that which was, in my opinion, the true case in respect to which they had rights against the defendants, the litigation might not have taken a very different turn. I think, therefore, it is a case in which the plaintiffs themselves have put their rights so

high, and failed to so large an extent, that I am justified, although giving judgment for damages in the manner I have done, to say that that judgment shall be without costs, and I do so accordingly.

Solicitors for plaintiffs: *Townley, Gard & Corbin.*

Solicitors for defendants: *Barnard & Co.*

See 19 Eng. R., 288 note.

Where a permanent right of way is acquired by a tenant, as appurtenant to the demised premises, at the expiration of the tenancy it enures to the benefit of the landlord: *Dempsey v. Kipp*, 61 N. Y., 462.

An easement of light and air is an incorporeal hereditament, and, like all other easements upon or in land, is an interest in the land: *Ray v. Sweeney*, 14 Bush (Ky.), 1.

A convenience, created by the owner of two estates, notorious, permanent and visible, ripens into a servitude, and passes to a sheriff's vendee of the dominant estate: *Building, etc., v. Getty*, 33 Leg. Int., 238.

J. & C. owned certain lands as tenants in common. A strip thereof twenty-five feet wide running north and south across the same was used as a way. J. & C. conveyed a portion of said lands bounded on the east by the west line of the way, the deed containing a clause giving to the grantee the right to use in common with the grantors "a way to be laid out on the easterly side of the premises hereby conveyed twenty-five feet in width." By the judgment in an action for partition of the remainder of the land, the portion allotted to C. was bounded on the east by the west line of the way, and that allotted to J. was bounded on the west by the same line, it being provided in the judgment that the way should be extended across the land of the width of twenty-five feet, and should be "forever kept open as a common way for the common use" of J. & C., their heirs, etc. J. subsequently mortgaged the land lying east of the way "with appurtenances." The west line of the land as described in the mortgage was coincident with the east line of the way, but the way was not mentioned, and was not necessary for access to the mortgaged premises. This mortgage was foreclosed,

the mortgaged premises sold and plaintiff acquired title thereto. Defendant's testator acquired title to the portion conveyed by J. & C., and also to the land covered by the way, which he threatened to close up. In an action to restrain him from so doing, held, that the way was not an easement appurtenant to the land mortgaged, but a *quasi* non-continuous easement which did not pass by the word "appurtenances," and that defendant's testator having become possessed of the dominant and servient tenements had the right to close up the way: *Parsons v. Johnson*, 68 N. Y., 62, distinguishing many cases.

The owner of two adjoining lots of land built a house on each, with a chimney between them, which was built entirely on one lot but was intended for the use of both houses, and had suitable entrances into it from each house. Afterwards, by simultaneous deeds, he conveyed one lot to A. and the other to B., describing the lots by metes and bounds, with "all rights, easements, privileges and appurtenances to the said land belonging," and with covenants of warranty against all incumbrances made or suffered by the grantor, but containing no reference to the chimney. In an action by A. against B. for taking down the chimney, the jury found that A. could have built a chimney on his own land at a reasonable cost, and returned a verdict for B. Held, that if A. had an easement in the chimney, it was one created by implication, as being absolutely necessary to the enjoyment of his estate; and that, on the finding of the jury, no such easement was created: *Buss v. Dyer*, 125 Mass., 287.

The doctrine of the English common law in respect to ancient lights is not, and never was, in force in this state. What was said in *Manier v. Myers* (4 B. Monr., 514), in reference to the common law doctrine of ancient lights

is mere *dictum*: *Ray v. Sweeney*, 14 Bush (Ky.), 1.

The owner of two adjoining dwelling houses conveyed one of them, and there was a passage way under, and wholly constructed in the other, which was arched over such passage up to the second story. The passage had been used for some time by the tenants of both houses. The deed conveyed the lot by metes and bounds and did not include the passage way, and the grantee at the time of the purchase was informed that the right to use the way did not pass with the house. The grantee sold to the complainant, who purchased after inspecting the premises, but without any assurance from the original owner of the house. It was held that no right of way existed, and that the original owner might obstruct and close the same. Pipes placed under the passage way for the purpose of draining both lots by the original owner before he conveyed, and no notice given that he intended to disturb the same, constitute an apparent and continuous easement, clearly to be implied from the condition and necessities of the premises, and the original owner could be enjoined from disturbing or destroying this right of drainage: *McPherson v. Acker*, 7 Wash. Law Reporter, 452.

Where a grant is made in general terms of a right to enter upon the lands of the grantor and lay pipe for the purpose of conducting water across them, without specifying the place or size of pipe, after the grantee has, with the acquiescence of the grantor, once laid the pipe, what was before indefinite and general becomes fixed and certain, and the easement cannot thereafter be changed; it can neither be exercised in any other place, nor can the size of the pipe be increased.

Upon the lands of one B., which adjoining those of the plaintiff's, there was a spring, the waters from which flowed across the plaintiff's lands in a well defined natural channel, furnishing a constant supply of water for his horses and cattle. B., in 1863, granted to the B. & S. L. R. Co.—to whose rights defendant succeeded—the right to enter upon his lands, to build and maintain a reservoir, and to lay down and maintain an iron pipe to carry water

therefrom to a depot. Plaintiff also, with knowledge of such grant, granted to the same company the right to enter upon his lands "for the purpose of laying down and keeping in repair an iron pipe" to carry the water from said reservoir across said lands. The grantee excavated a reservoir, collecting therein the waters of the spring, and laid down a two-inch pipe across B.'s lands and the lands of the plaintiff, which left enough surplus water in the old channel to supply plaintiff's wants. In 1871 defendant improved and repaired the reservoir and put down a four-inch pipe in place of the two-inch iron pipe; this took so much of the water that not enough was left for plaintiff's use. In an action to recover damages for alleged trespass, held, that as the grant from the plaintiff was indefinite and general, the surrounding circumstances might be considered to define and limit the easement granted; that after the pipe had been once laid by the grantee, the right became fixed and certain, and it had no right thereafter to lay down a larger pipe, and that, therefore, the action was maintainable: *Onthank v. Lake Shore, etc.*, 71 N. Y., 194.

A city, for the purpose of widening a street, purchased a lot of land with a building thereon, which had by prescription an easement in a chimney standing on an adjoining lot of land, took down the building, appropriated the greater part of the land to the widening of the street, allowed the rest of the land to lie vacant for six years, and then conveyed it by deed of quitclaim:

Held, that the easement in the chimney was lost by abandonment, and did not pass to the grantee: *Canny v. Andrews*, 123 Mass., 155.

Where a deed of a city lot, in which the grantor and grantee join, contains a covenant on the part of the latter that neither he nor any person claiming under or through the conveyance shall build upon the lot any building of more than a specific depth, which covenant is declared continuing and for the benefit of owners of other lots then owned by the grantor, so that said lots may have "freedom of air, light and vision," one to whom one of the other lots has been conveyed by deed grant-

ing the easements, covenants, privileges, etc., belonging thereto, may enforce said covenant so long as it is of any value to his lot.

The right to enforce such covenant is not affected by acquiescence in the violation of another and distinct covenant, as to the use of the lot, contained in the deed.

A notice of an intention to violate the covenant given by one succeeding to the title of the grantee, to an owner of a lot for whose benefit the covenant was made, is sufficient to authorize the interference of a court of equity to restrain such violation; and if the intended violation is of a character to be entirely harmless, it devolves upon the defendant to show it.

The fact that the owner of another lot, who acquired title under a deed containing the same covenant, has violated it, is no defence to such an action; it does not release defendant from the performance of the covenant in his deed, so long as it remains of any value to the plaintiff.

Where the owner of the easement created by the covenant has made, or permitted permanent erections which substantially intercept the air, light and vision to and from his lot, the easement is thereby extinguished; and so if the erection interferes with the easement to a certain extent, to that extent it is destroyed; the fact that the owner chooses to relinquish part of his easement does not deprive him of the whole. It devolves upon the defendant, in an action upon the covenant, to show that the erection, either in whole or in part, destroyed the easement: *Lattimer v. Livermore*, 72 N. Y., 174; *Dubois v. Darling*, 44 N. Y. Superior Ct. R., 436; *Musgrove v. Sherwood*, 54 How. Pr., 311, as modified,

S. C., 54 How., 338; *Trustees, etc., v. Lynch*, 70 N. Y., 440, reversing 39 N. Y. Superior Ct. R., 372.

As to what act by the owner of one lot will be a defence to such a covenant as to the owner of another lot who has acted upon and been induced to believe thereby that the servitude was abandoned: *Dubois v. Darling*, 44 N. Y. Superior Ct. R., 437.

The father of plaintiff owned land through which defendant's road ran. Defendant had constructed an embankment so negligently that a portion thereof slid down upon the adjoining land, causing damage. In consideration of a sum paid by defendant, the owner executed an instrument, under seal, releasing the damages, and also agreeing that, if in consequence of the peculiar construction of the embankment or nature of the soil land slides should thereafter occur, he would make no claims for damages, and that he and his heirs and legal representatives would consider the sum paid full compensation for all future damages so occasioned, and that the instrument should bar all future claims. Plaintiff inherited the land, on the death of his father, and another land slide having occurred, occasioned by the negligent construction of the embankment, brought this action for damages. Held, that the instrument was a grant of the privilege to maintain the embankment as it then was, free from liability for damages occasioned by the deposit of earth, etc., by land slides therefrom, and created a servitude to that extent; and that plaintiff inherited the land subject to such servitude and could not recover: *Van Rensselaer v. The Albany & West Stockbridge Railroad Company*, 62 N. Y., 65.

[6 Chancery Division, 770.]

Fry, J., July 23, 1877.

MOËT V. PICKERING.

[1876 M. 295.]

Trade-mark—Infringement—Injunction—Lien for Costs—Costs of Stakeholder.

On the granting of an injunction to restrain the infringement by the principal defendant of the plaintiff's trade-mark :

Held, that the plaintiff was entitled to a lien for his costs of the action upon goods marked with the spurious mark which were in the hands of a wharfinger (a defendant) who had received them from the principal defendant in the ordinary course of business without knowledge of any fraud, and that this lien was superior to any lien of the wharfinger in respect of his charges, and to any rights of the trustee in bankruptcy of the principal defendant, who had become bankrupt since the commencement of the action :

Held, also, that as the wharfinger had not unequivocally submitted to the order of the court, but had insisted on the priority of his lien on the goods in respect of his charges, he had lost his right to be paid his costs of the action by the plaintiff, and must, on the contrary, be made jointly liable for the plaintiff's costs of the action.

THIS was an action to restrain an alleged infringement of the plaintiff's trade-mark.

By the statement of claim it appeared that the plaintiffs, Messrs. Moët & Chandon, were producers and shippers of champagne at Epernay, in France. Their wine had acquired 771] a high *reputation, and was known in the trade and to the public as Moët & Chandon's champagne. They had been in the habit of placing on the bottom of each cork with which one quality of their wine was bottled a brand consisting of the letters "M. & C.," together with a star, all inclosed in a circular ring, and the word "England" was branded on the side of each cork. This brand had been used by the plaintiffs for a quality of champagne specially prepared for the English market.

The defendant Joseph Pickering had had consigned to him from his agents abroad a large quantity of champagne, not produced by the plaintiffs, in bottles with corks branded with a brand similar to that of the plaintiffs, and he was about to sell this wine in England as the plaintiffs' wine. The wine so consigned to him was in the possession of Messrs. Besley & Wilson, wharfingers in London, who were also made defendants to the action.

The plaintiffs claimed an injunction to restrain Pickering from selling any champagne in bottles with corks bearing the plaintiffs' brand or only colorably differing from it ; an injunction to restrain Pickering from dealing with any of the champagne which was in the possession of Besley & Wilson, and to restrain Besley & Wilson from parting with

that champagne except under the direction of the court; an order that Pickering should deliver up to the plaintiffs all corks in his possession or power branded with the plaintiffs' brand or any imitation of it; an account of profits made by Pickering by the sale of wine sold by him in bottles with corks bearing the plaintiffs' brand or any imitation of it; and the payment of damages by Pickering.

On the 17th of October, 1876, an interlocutory injunction was granted by Mr. Justice Field, as vacation judge, restraining Pickering, until judgment in the action or until further order, from selling any champagne in bottles with corks bearing the plaintiffs' brand or any imitation of it, and from dealing with or disposing of any of the champagne in the possession of Besley & Wilson, and to restrain Besley & Wilson from parting with any of that champagne.

By their statement of defence Besley & Wilson said that they received the champagne which was in their possession from Pickering *in the ordinary course of business, [772 and without any knowledge or notion that the brand on the corks was a fraudulent imitation of the plaintiffs' brand. They submitted to act in relation to the champagne in their possession as the court should direct, upon their charges for rent or warehousing and their costs of the action being paid or provided for.

In April, 1877, Pickering was adjudicated a bankrupt. His trustee in the bankruptcy was not made a party to the action.

This was the trial of the action. Pickering did not appear, but the service of the notice of trial upon him was proved. His trustee in the bankruptcy appeared by counsel.

Daniel Jones, for the plaintiffs: The evidence proves that we are entitled to the relief we ask.

[FRY, J.: How can a brand which is not visible till the cork is drawn be the subject of protection as a trade-mark? The spurious brand cannot be the means of inducing any one to purchase the defendant's wine, as the purchaser would not see it till after he had made the purchase.]

It is the common custom of the trade to place the brand on the inside of the corks. We are entitled to a lien for our costs of the action on the wine in the wharfinger's possession: *Upmann v. Elkan* (*).

W. W. Karstlake, for the trustee in the bankruptcy: Such a lien can only arise by reason of the judgment. It is therefore defeated by the prior bankruptcy.

[FRY, J.: You only take the bankrupt's interest in the

(*) Law Rep., 12 Eq., 140; Law Rep., 7 Ch., 130; 1 Eng. R., 474.

wine. There was a *lis pendens* before the adjudication of bankruptcy.]

B. Eyre, for the wharfingers: We received the wine in the ordinary course of business without any knowledge of a fraud, and are entitled to be paid our costs of the action by the plaintiffs. We have also a right of lien at common law upon the wine for our charges, and this lien must have precedence over any lien of the plaintiffs for their costs.

773] *FRY, J.: I cannot accede to that argument. The wharfingers say that they have an interest in these goods in the shape of a lien for their charges anterior to the plaintiffs' lien for their costs. In my opinion they have no such right. If they had unequivocally submitted themselves to the order of the court I should have given them their costs of the action. I cannot do so now. I shall grant an injunction against Pickering and against the wharfingers, and shall order the wharfingers to remove the corks from the bottles. This must be done in the presence of the plaintiffs' agent, if they desire it. I make a declaration that the plaintiffs are entitled to a lien on the wine for their costs of the action as against both the defendants, and I order both the defendants to pay those costs. Pickering must account for profits.

Solicitors for plaintiffs: *Nicol, Son & Jones*.

Solicitors for wharfingers: *Arkcoll, Jones & Cockle*.

[6 Chancery Division, 773.]

Fry, J., Aug. 1, 2, 3, 4, 6, 1877.

WEST CUMBERLAND IRON AND STEEL COMPANY V.
KENYON.

[1876 W. 80.]

Mine—Water—Use of Property—Water discharged into neighboring Mine—Negligence—Ordinary Course of Working—Damages—Injunction.

The owner of a mine, who by means of a pit or shaft intercepts water which previously flowed in unascertained underground channels, is not entitled by any means not in the ordinary and proper course of working his mine to cast the water thus intercepted upon the land of his neighbor, even though, if the water had not been thus intercepted, it would have flowed naturally upon that neighbor's land.

By intercepting the water the person who digs the pit or shaft makes the water his own property, and must take the burden as well as the benefit of it. And if he afterwards casts it wrongfully on his neighbor's land, he will be liable for the damage thus done to him.

THE plaintiffs and the defendants were proprietors of adjoining collieries. The action was brought to restrain the defendants from permitting water to flow through a certain

borehole in their *mine directly or indirectly into the [774 plaintiffs' workings, and for damages.

The plaintiffs were the lessees of a colliery, situate in the parish of Workington, in Cumberland. The defendants, Henry Kenyon and John Campbell, became in June, 1875, lessees from the trustees of John Harris of a small coalfield situate in the adjoining parish of Brigham, also in Cumberland. Both collieries were situate close to the river Derwent. The defendants' was wholly to the south of that river and to the east of the plaintiffs'. The greater part of the plaintiffs' colliery was also to the south of the Derwent, but a portion of it was on the north side of that river. The same seams of coal were found in the plaintiffs' colliery and in the defendants' coalfield, but there was a fault, running in a direction approximately from north-west to south-east, which crossed that part of the plaintiffs' collieries which lay to the south of the Derwent. There were three seams of coal existing in both collieries, called respectively the Ten Quarters Seam, the Rattler Band, and the Main Seam, the Ten Quarters Seam being the nearest to the surface. The plaintiffs' colliery was at the dip of the defendants'. But on the north-east side of the fault the coal measures were from forty to sixty feet lower than on the south-west side. The plaintiffs were working the Main Seam (that is, the lowest of the seams) by means of a pit called the Lowther Pit, south of the Derwent, south-west of the fault, and about half a mile to the west of the boundary between the two collieries. On the north side of the Derwent the fault had been pierced by a driftway to the west of the plaintiffs' colliery, and connected therewith, and through this a communication existed between the plaintiffs' workings on the north side of the Derwent and the Lowther Pit. In the defendants' coalfield the Ten Quarters Seam lay about 126 feet below the surface of the ground, and the Rattler Band about thirty feet below the Ten Quarters Seam. The Main Seam in the defendants' coalfield had been worked out to the boundary thereof many years before the defendants became lessees. The workings had been effected by means of three shafts, called Hardy Gate Shaft, Old Banks Shaft, and Limefitts Shaft. Limefitts Shaft was near the western boundary of the defendants' coalfield, and nearly due east of the *plaintiffs' Lowther Pit, and about half a mile [775 distant from it. Old Banks Shaft and Hardy Gate Shaft were situate in that order to the south-east and on the rise of Limefitts Shaft. There was in most places a barrier between the plaintiffs' and the defendants' workings where

they adjoined of thirty-five yards in thickness on each side, but at one point just under the Derwent there was no barrier on the defendants' side. Hardy Gate Shaft and Old Banks Shaft had been disused for many years when the defendants became lessees, but at that time Limefitts Shaft was used by the trustees of John Harris for pumping the water out of an adjacent coal mine called Millbanks (not comprised in the defendants' lease). In June, 1875, the trustees of John Harris, having ceased to work the Millbanks Mine, drew the pumps from Limefitts Shaft. The water then gradually rose in the old workings of the Main Seam until it reached the height of fifteen fathoms in Limefitts Ptt. The water forced its way through such barrier as was left under the river Derwent, and got into the old workings belonging to the plaintiffs to the north of the Derwent, and there rose to such a height that it passed along the driftway through the fault and into the plaintiffs' main workings, and thence found its way by natural gravitation to the Lowther Pit, from which point it was pumped out by the plaintiffs' after the withdrawal of the Limefitts pumps. Towards the end of July the water was found to increase greatly at the Lowther Pit. It had previously been about 300 gallons a minute, it then rose to 500 gallons a minute, and so continued up to the 15th of December following.

In June, 1875, the defendants commenced sinking a new shaft, called New Banks Shaft, between Limefitts Shaft and Old Banks Shaft, and they continued their operations until the 12th of August, 1875, when at a distance of sixteen fathoms from the surface they reached the water. On the 18th of August they abandoned the sinking of the shaft, and commenced boring a borehole. The boring was continued until the 19th of October, 1875, when a depth of about forty fathoms had been reached, and the water flowed away through the borehole. The Main Seam was about five fathoms lower. The borehole subsequently got stopped up, and after considerable difficulty and expense the obstruction was removed and the water was again allowed to flow [776] down. That was *about the end of November, 1875. On the 15th of December the plaintiffs found a great increase in the quantity of water which they were compelled to pump at the Lowther Pit. It had then reached 800 gallons per minute. It so continued till January, 1876, when it again fell to 700 gallons per minute, at which amount it remained, without any material variation, down to the trial of the action.

On the 26th of January, 1876, the writ in the action was

issued. A motion for an injunction was made, but the motion was ordered to stand to the trial.

The statement of claim contained the following allegations (paragraph 4): "The said borehole or passage was not made for the purpose of getting the coals or other minerals removed in making the same, or otherwise in the ordinary course of mining, but was made with the intent and for the purpose of getting rid of the water found or arising in the said shaft of the defendants; and their working of the Ten Quarters Seam and Rattler Band, by discharging it into the plaintiff company's workings in the the Main Seam, or at all events into old workings or hollows from whence it naturally, and in fact necessarily, flows into the plaintiff company's workings, and the defendants, by the said borehole or passage, have diverted and are discharging such water wrongfully into the plaintiff company's workings, so causing to flow into such workings a large amount of water which would not otherwise have found or find its way thither. The defendants, in fact, are by the means aforesaid causing an enormous quantity of foreign water to flow into the plaintiff company's workings, and the plaintiff company, to their great damage and loss, have been and are compelled at great expense, in order to continue their workings in the Main Seam and other seams at the Lowther Pit, to pump all such water to the surface, inasmuch as their workings would otherwise be inundated and have to be stopped." The water which flowed through the defendants' borehole found its way, as the plaintiffs alleged, into that part of their workings which was on the north side of the Derwent, and thence to the Lowther Pit.

The plaintiffs claimed—(1.) Damages for the wrong complained of; (2.) An injunction to restrain the defendants from permitting any water to flow through or by means of the borehole, or permitting *the borehole to remain [777 open, and from in any manner, through the borehole or any other channel or passage, diverting or discharging water from their shaft or mine, or causing water to flow therefrom directly or indirectly into the plaintiffs' workings, or any workings or hollows open to or communicating directly or indirectly therewith.

The defendants' statement of defence contained the following allegations (paragraph 15): "The borehole was not made with the intent and for the purpose of getting rid of the water found or arising in the defendants' new shaft and their workings of the Ten Quarters Seam and Rattler Band by discharging it into the plaintiffs' workings in the Main

Seam or into old workings or hollows from whence it naturally or necessarily flowed into the plaintiffs' workings. The borehole was made in the usual and proper manner, and in the ordinary course of good mining, for the purpose of proving the minerals in the defendants' coalfield, so as to enable them to decide whether it was worth while to continue sinking their shaft to work the minerals or not. The defendants have in fact already sunk their shaft through the Ten Quarters Seam and Rattler Band, and they worked the Rattler Band for some time by means of both the new shaft and Limefitts Shaft, so as to establish a communication between the two shafts, but they have lately ceased to work from the latter shaft." Paragraph 16: "The defendants deny that they by their borehole have diverted and are discharging the water in their new shaft and workings of the Ten Quarters Seam and Rattler Band wrongfully into the plaintiffs' workings, and so causing to flow into such workings a large amount of water which would not otherwise have found its way there, and say that if more water than usual from the defendants' coalfield finds its way into the plaintiffs' colliery, it does so in consequence of the drawing of the pumps at Limefitts, and by percolating through the measures naturally, and owing to the law of gravitation, in consequence of the plaintiffs' colliery being at the dip of the defendants' coalfield, and not through any malice, wrongful act, or negligence of the defendants, and that such water would have found its way by percolating through the measures, even if the defendants had not sunk their new shaft or made their borehole at all."

778] *The defendants also denied that there had been any perceptible increase of water in the plaintiff's collieries since the borehole had been made.

In an answer put in by the plaintiffs to some interrogatories delivered by the defendants, they said that since and by means of the opening of the defendants' borehole the quantity of water which they had been compelled to pump by their engine at the Lowther Pit had been increased by an amount of about 200 gallons per minute.

This was the trial of the action.

North, Q.C., and *Ingle Joyce*, for the plaintiffs: On the evidence it is clear that the defendants made the borehole, not in the ordinary and proper course of working their mine, but only for the purpose of getting rid of the water. They are not entitled, therefore, to throw it upon our mine. They have no right to be active agents in sending water from

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their mine into ours: *Baird v. Williamson* (*). In that case Chief Justice Erle said, "The law does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine or advantageous to himself. *Smith v. Kenrick* (*), *Acton v. Blundell* (*), and *Rylands v. Fletcher* (*), illustrate the same principle. The evidence shows that the water from the borehole has substantially increased the costs of the plaintiffs' pumping.

Ince, Q.C., Cookson, Q.C., and Plummer, for the defendants: The borehole was made in the ordinary and proper course of working, and therefore *Smith v. Kenrick* is an authority in our favor. And in *Smith v. Fletcher* (*) the court held that there was a material distinction between water which came to the plaintiffs from a natural overflow of a stream and that which came by reason of a diversion of the stream which the defendants had made. In *Wilson v. Waddell* (*) it was held that an injury arising entirely from gravitation and percolation was not a valid *ground [779 for claiming damages. *Rex v. Commissioners of Sewers for Pagham* (*) is also in our favor, and so is *Crompton v. Lea* (*). We are entitled to credit for so much of the water flowing through the borehole as would have found its way naturally to the plaintiffs' mine if the borehole had not existed.

[FRY, J., referred to *Chasemore v. Richards* (*).]

This will practically reduce the damages to nothing.

FRY, J., after stating the facts and the issues raised in the pleadings, continued:

The defendants in effect say that they bored for legitimate mining purposes, and not solely or exclusively for the purpose of getting rid of their water. That is the issue of fact which I have to try, and it appears to me upon the whole to be reasonably clear that the boring was, at any rate after the defendants had passed through the Rattler Band, exclusively for the purpose of getting rid of their water. [His Lordship reviewed the evidence on this point, and continued:]

I therefore, upon the evidence, come to the conclusion that the borehole, at any rate below the Rattler Band, was not made for a legitimate mining purpose, that is, it was not

(*) 15 C. B. (N.S.), 376.

(*) 7 C. B., 515.

(*) 12 M. & W., 324.

(*) Law Rep., 3 H. L., 330.

(*) Law Rep., 9 Ex., 64.

(*) 2 App. Cas., 95.

(*) 8 B. & C., 355.

(*) Law Rep., 19 Eq., 115; 11 Eng. R., 719.

(*) 7 H. L. C., 349.

made in the ordinary, proper, and reasonable mode of working the defendants' mine.

It is then said by way of defence that if there were an injury there was nevertheless no damage, and the mode in which that argument has been presented is twofold. In the first place it is said that the water, or at any rate a large part of the water which was collected by the sinking of the New Banks Pit would have found its way into the Old Banks Pit, which lies to the dip of the New Banks Pit; that the Old Banks Pit communicates with the old hollows in the main seam below; that the water would have originally flowed to Limefitts Shaft and have been pumped out there, but that when the Limefitts pumps were withdrawn, it would have flowed through the barrier into the plaintiffs' workings to the north of the Derwent, and thence through the old piercing of the fault to Lowther Pit, and 780] would there have been pumped out. I think *that the evidence renders that contention, at any rate as regards a large part of the water collected in the New Banks Pit, highly probable, and the question therefore arises whether that is or is not an excuse of which the defendants can avail themselves.

The question arises in this way. A man by sinking a pit intercepts underground water, not flowing in any well ascertained or known course, and throws that water upon his neighbor's land. He then says, That water, or a portion of it, would have flowed upon you if I had not intercepted it, and you cannot charge me with the damage done by the water so flowing on to your land because I have done you no harm; the terminus at which the water arrives is merely that at which it would have arrived independently of what I have done. I am of opinion that that argument ought not to prevail. The difference between water flowing in a well known and ascertained channel upon the surface or underground, and water which finds its way through channels not well known and ascertained, is well understood and established, and it may be observed that the distinction does not depend upon the incapacity of the courts to find the direction which the water would take in these unascertained channels, because in the case of *Acton v. Blundell* ⁽¹⁾ (which is perhaps the leading authority on this branch of the law) the course of the underground channels was ascertained to this extent, that it was found as a fact that the consequence of sinking the pit by the defendant was to withdraw

(1) 12 M. & W., 324.

the water from the plaintiff's well; in other words, it was ascertained that the water which would have flowed to the well was intercepted by the pit. Water flowing in a well established channel is, as we all know, not the subject of property. It is the subject only of usufruct. Standing water, on the other hand, is the subject of property. Now, he who sinks a well, or a shaft, or a pit on his own land is entitled to collect into that pit from all the pores of the land, from the small runlets and channels with which the soil is interspersed, such water as will naturally flow to that pit. That water he may make his own. It is immaterial whence it flows. A person who is injured by the sinking of the pit, though he can show that injury has resulted to him, has no right of action against the person who has sunk the *pit. The water which before ran in unknown chan- [781] nels has now been collected into an ascertained reservoir or receptacle, and has become the property of him who has so collected it. By making it his property, the person who sinks the pit, in my opinion, takes with it and incurs all the liability which attaches to that property, and he cannot, after having so appropriated the water, cast it upon his neighbor and excuse himself by saying, It would have flowed to you if I had not appropriated it. The time of his appropriation of the water is the time at which we are to look with regard to the measure of his liability. He cannot appropriate it for the purpose of benefit, and not for the purpose of liability. If he takes the benefit of the water by accumulating it in his pit, he takes also the liability, and he is bound to protect his neighbor from the injury which that water may cause him. He takes it alike for benefit and for burden, for better and for worse. He cannot appropriate it for the purpose of benefit to himself, and then ask the court to expropriate it for the purpose of relieving him from the liability which would otherwise rest upon him. That seems to me to be the fair conclusion of law when it is once admitted that the court will not regard the underground courses through which water flows, unless they are well ascertained and known. I hold, therefore, that the defendants, having made the water their own by collecting it in their pit, are just as much responsible for it as if it had come from any other source than that from which it is suggested that it did come, and that they cannot relieve themselves from liability by showing that the water, if it had not been so collected, would nevertheless have found its way to the plaintiffs' workings.

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The next point is this. It is said in effect that no portion of the water which comes to the Lowther Pit is to be attributed to the borehole. [His Lordship reviewed the evidence and the argument on this point, and continued:] I think that a substantial part of the increment of the water which is pumped at Lowther Pit—at least a tenth part of it—must be taken to have its source in the New Banks Shaft of the defendants, and to have been cast by them upon the plaintiffs' mine. What is the exact amount of the damage caused by this contribution of water from the defendants' pit I am not asked now to ascertain, but I have [782] come to the conclusion *that substantial damage has been caused to the plaintiffs by that water. The evidence before me is not very definite or clear; but one of the witnesses considered that, even if the contribution from the borehole was taken as only forty-five gallons per minute, the additional pumping would cost the plaintiffs upwards of £100 a year.

Now, considering that the plaintiffs have a term of something like seventeen years to run in their mine, I cannot say that an extra expenditure of £100 a year is by any means an unsubstantial sum. I come, therefore, to the conclusion that damage has been caused to the plaintiffs by the wrongful act of the defendants, and I hold that there is both *damnum* and *injuria*.

It follows from this that an injunction must be granted as well as damages assessed; and the judgment which I propose to give will be in these terms: I propose to restrain the defendants from permitting the borehole to remain open, and from causing or permitting any water to flow through or by means of the borehole or through or by means of any other channel or passage, not being a channel or passage made in the ordinary, reasonable, and proper course of mining, from the shaft or mine of the defendants into the workings of the plaintiffs, or into any water communicating therewith. I then propose to declare that the difference between the actual cost of pumping at the Lowther Pit from the 19th of October, 1875, to the time of the borehole being actually stopped, and the sum which would have been the cost of pumping during the same period if the New Banks Pit had been sunk down to the Rattler Band, and if no borehole had been carried below that seam, is the true measure of damages. Then to refer it to the Chief Clerk to assess the damages; and of course I must give the plain-

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tiffs the costs of the action, including the costs of the motion for an injunction.

Solicitors for plaintiffs: *Bischoff, Bompas & Bischoff*, agents for E. & E. L. Waugh, Cockermouth.

Solicitors for defendants: *Speechly, Mumford & Co.*, agents for Hayton & Simpson, Cockermouth.

See 19 Eng. Rep., 340 note; 21 Eng. Rep., 48 note.

As to liability of a railroad company using portion of a highway to restore it to its former usefulness, and what it must do in case a bridge be erected by it in so doing, see *People v. N. Y. Central, etc.*, 74 N. Y., 302; *Queen v. Sears*, 6 Allen (New Brunswick), 68; *State v. New Haven, etc.*, 45 Conn., 331.

Where the charter of a railroad company gives it the right to construct its road across a watercourse only on condition that the same should be restored to its former state, or in such manner as not to impair its usefulness, a bridge erected over such watercourse which does not fulfil this condition of the charter is both a public and private nuisance, as much so as if it had been erected without legislative authority: *Healey v. I. & C. R. R. Co.*, 2 Bradwell's Rep., 435.

If a city, in exercising the power of changing the grade of its streets, fails to exercise prudence and skill, it will be liable for all damages that result from such action: *Bloomington v. Gregory*, 77 Ills., 194.

See numerous cases cited in *Weed v. Greenwich*, 45 Conn., 183-190.

A city is liable if it authorizes a railway company to so use a public highway as to prevent adjoining owners from properly using it as such: *Stack v. East St. Louis*, 85 Ills., 377; *Pekin v. Brereton*, 67 Ills., 477.

See *Shawneetown v. Mason*, 82 Ills., 337.

A city is liable to the owner of a lot adjoining a public street, if in raising the grade of the street it erect an embankment, without making suitable drains so as to prevent water from being thrown upon the lot of such adjoining owner. If in raising the grade of a street it turns a stream of water or mud on his grounds or in his cellar, it is liable to him for his damages: *Shaw-*

neetown v. Mason, 82 Ills., 337; *Bloomington v. Brokaw*, 77 Ills., 194; *Kemper v. Louisville*, 14 Bush (Ky.), 87.

See numerous cases cited: *Weed v. Greenwich*, 45 Conn., 183-190; also *Taylor v. Fickas*, 64 Ind., 167.

So if, in raising the grade of one of its streets, a city creates a stagnant pond that brings disease upon the owner of a lot, in the vicinity, or his family, it is liable to him for the damages sustained thereby: *Shawneetown v. Mason*, 82 Ills., 337.

See, however, substantially to the contrary, *Kemper v. Louisville*, 14 Bush (Ky.), 87.

In New York it has been held that where a municipal corporation, in grading two public streets which formed an angle in which the plaintiff's premises were situated, raised those streets so as to prevent the water from flowing off, whereby damage ensued to the plaintiff, who brought case against the corporation, the action could not be sustained: *Wilson v. Mayor, etc.*, 1 Denio, 595.

Where a municipal corporation has raised the grade of a street, it is not liable to an adjoining owner for damages caused by a flow of water from the street on to his land, in the absence of proof that the change of grade caused more water to flow on the land than would have flowed there if no change had been made; it is not bound to protect him by sewers or embankments from the rain water that falls on the street.

A municipal corporation has as much right to fill up and raise a street as a private owner of a city lot has to fill it up and improve it. In so doing the latter may not collect the surface water in a channel, and throw it upon his neighbor's land, but he is not bound to collect such water and lead it into a sewer for his neighbor's protection.

A municipal corporation may exer-

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cise an absolute discretion whether it will build a sewer at any particular place, and what water it will conduct into an existing sewer, and what drains it will connect therewith: *Lynch v. Mayor, etc.*, 8 N. Y. Week. Dig., 253, Court Appeals.

See note 28 Am. Rep., 101.

Though where defendant made one of its streets, upon which was situated a lot belonging to plaintiff, a gutter and curb, which ended opposite plaintiff's lot, and which conducted the water of the ward down that street; the water having no outlet, flowed upon plaintiff's lot, flooding his house, etc. Before this gutter was made, there was a natural course which took off the water another way. A drain could have been made to carry it off. In an action to recover the damages, held that the facts established a cause of action: *Byrnes v. City of Cohoes*, 67 N. Y., 204; *Bostable v. Syracuse*, 72 N. Y., 64, 8 Hun, 587.

The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage, does not apply where the necessity for the drainage is caused by the act of the corporation itself: *Byrnes v. Cohoes*, 67 N. Y., 204.

Where a town does an act lawful in itself in such a manner as to create a nuisance, it is liable in the same manner that an individual would be.

The authorities of a town built a bridge in such a manner as to set back the water of the stream upon the plaintiffs' land. Held that the town was liable to the plaintiffs for the damage done.

Where a declaration in an action on the case, against a town, for so constructing a bridge as to set the water back upon the plaintiffs' land, contained no averment that there was negligence or unskillfulness in the construction of the bridge, it was held to be a matter of form, the want of which could not be taken advantage of on general demurrer: *Mootry v. Town of Danbury*, 45 Conn., 550.

As to the liability of the owner of a city lot to the city, for damages it was compelled to pay to one injured in consequence of the negligence of such owner while building, or of a contractor engaged in erecting a building for the city, see *Rochester v. Montgomery*,

72 N. Y., 66, distinguishing *City v. Halloway*, 7 N. Y., 497.

Where the owner of premises so constructs his roof that the rain water collecting thereon flows against the wall of his neighbor, penetrating the same and causing damage, he cannot relieve himself of the responsibility for damage thus occasioned, by showing that if the wall had been well built the water would not have entered.

The contributory negligence which bars a recovery for an injury, is that which co-operates in causing the injury; some concurring act or omission of the other party to produce the injury—not the loss merely, and without which the injury could not have happened.

Negligence which has no operation in causing the injury, but which merely adds to the damage resulting, is no bar to a recovery, though it will detract from the damages, and the jury must, in the assessment of damages, properly distinguish between the amount of damage arising from each cause, and give a verdict for the damage arising from the defendant's negligence only: *Gould v. McKenna*, 86 Penn. St. Rep., 297.

The owner of land may prevent surface water flowing on his land, whether from a highway or an adjoining field.

The plaintiff failing to show any easement in, or right to, the sewer on defendant's land, by deed or prescription, has no cause of action against defendant for closing it: *Murphy v. Kelly*, 68 Maine, 521.

The owner of a plantation is not liable for damages to an adjoining plantation caused by works erected on his own plantation, in order to prevent its inundation by a destructive overflow of the Mississippi river; more especially when the owner of the adjoining place refused to co-operate in a common work for the protection of both places.

One cannot claim indemnity for damages which he has contributed to bring about by his own negligence or culpable indolence: *Mailhot v. Pugh*, 30 Louis. Annual Rep., 1359.

A municipal corporation was authorized by act of the legislature to extend its limits, and in pursuance of such authority extended a street into and along a country road, and graded and paved such extension, whereby a greater

amount than formerly of surface water was conducted along the street, and was emptied into the race of a mill within the city, and a larger quantity of mud, sand, and debris than formerly was thus carried into the race to the mill. In an action by the miller to recover damages for obstructing the free flow of water through the race, held, there was no cause of action: *Mayor, etc., v. Wilson*, 7 Reporter, 336, Court of Appeals, Md.

In an action for injuries caused by the defective condition of a foot-bridge or apron crossing a gutter in a city street, it appeared that the apron was built by the owner of adjoining property, without consent of the city, near to, but not directly in the line of a street crossing, and that the city had never formally adopted it, nor made any repairs upon it; but there was evidence that it had existed there, and been actually used as part of a public thoroughfare for a considerable length of time, with knowledge of the city and without objection on its part: Held, that proof of these facts would create a presumption that the city had adopted the apron as part of the street crossing, and had become liable for injuries caused by a defective condition of the apron, of which it had notice; and that the continuance of such condition for several weeks would create a presumption of notice: *Johnson v. The City of Milwaukee*, 46 Wisc., 568.

In an action of tort against a surveyor of highways for the removal, while acting within the scope of his authority, of earth and gravel from the highway in front of the plaintiff's estate, for the purpose of making repairs, the surveyor's judgment as to the necessity of such repairs is conclusive, and his good faith in making them cannot be questioned, whether the repairs are made opposite such estate or on another part of the way, or on another highway within his jurisdiction; and the only remedy is under the Gen. Sts., c. 44, § 19.

A surveyor of highways, while acting within the scope of his authority, may remove earth and gravel from one highway, or part of a highway, to another within his jurisdiction: *Dennison v. Clark*, 125 Mass., 216.

Commissioners of highways are individually liable in an action on the

case for making a drain or ditch, and a grade or embankment so near the land of a party, and in so unskilful and careless a manner as to cause the rain and surface water running from such drain to flow upon the plaintiff's premises to his injury.

The work of constructing or repairing a public highway is not a judicial, but a ministerial act, and must be performed with a proper regard to individual rights as well as the public accommodation, and for the negligent performance of ministerial acts the commissioners of highways are personally responsible if injury results to others: *Tearney v. Smith*, 86 Ills., 391.

See *Spitznogle v. Ward*, 64 Ind., 30.

The servant of the occupants of an upper tenement accidentally left open a faucet, thereby causing the water to overflow and flood the tenement below:

Held, that the occupants of the upper tenement were liable for the damage thereby done: *Simonton v. Loring*, 68 Maine, 164.

See note 28 Am. Rep., 82.

If the Croton water pipes which are arranged for an entire building rented in tenements, and which supply water to the part occupied by the tenant, get out of repair, the landlord of the whole building is the one to repair them, and not a tenant who merely occupies a particular part of the building, for a tenant is not bound to make permanent repairs that relate to the whole structure, when he merely occupies part of it. The act of the landlord who occupied the lower part of a building, in shutting off the water from the upper part, because the Croton water pipes were out of order, and the tenant who occupied such upper part refused to repair them, held to amount, under the circumstances, to an eviction sufficient to justify the tenant in abandoning the premises, and in that way relieving himself and surety from the payment of rent: *West Side Savings Bank v. Newton*, 57 How., 152.

The plaintiff was the owner of a farm through which ran a stream, upon which, adjoining plaintiff's farm, and situated above it on the stream, defendants had a cheese factory. Defendants discharged into the stream refuse washings and whey, so as to render the water unwholesome, offen-

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sive and unfit for the uses of plaintiff's farm. Upon the trial of an action brought to restrain such use of the factory, it appeared that plaintiff knew when the factory was built that it was customary for factories in that part of the country to discharge the surplus whey into streams, and that he made no objection when the subject of such discharge was spoken of.

Held that he was not thereby estopped from maintaining his action.

The factory was put in operation in the spring of 1874, during which season, and that of 1875, plaintiff patronized it, and made no objection to the whey being discharged into the stream. In December, 1875, defendants bought the factory and operated it in 1876 substantially as before. This action was brought in the spring of 1877.

Held, that as the plaintiff had not induced the purchase by any act or representation, he was not estopped from maintaining this action against the defendants: *Snow v. Williams*, 16 Hun, 468.

A. appropriated the waters of a certain stream, by turning them into his ditches, and through them, into his reservoirs. B. located above A., and emptied the waters of a *different stream*, mixed with large quantities of earth and sediment, into that appropriated by A. By reason of this A. suffered damage in being put to expense to clean out his ditches—in obtaining a decreased supply of water—and by loss of custom arising from its deteriorated quality. A. brought this action against B., to recover damages for the said injury.

Held, that A. had a right to recover: *Hill v. King*, 2 Labatt's Dist. Ct. Rep., 169.

The invasion of an established right will in general *per se* constitute an injury for which damages are recoverable; for in all civil acts the intent of the actor is less regarded than the consequences to the party suffering. However laudable industry may be, its managers are still subject to the rule that their property cannot be so used as to inflict injury on the property of others.

To render a particular case an exception to the general principles controlling the exercise of dominion over property by its proprietor, it must be

ascertained to be exceptional in its surroundings or its facts. Except where it is qualified by the existence of peculiar conditions, the duty of the owner of property is defined by the maxim, "*Sic utere tuo ut alienum non loedas*." S. purchased a tract of land in the coal regions, upon which he erected a handsome residence. One of the principal inducements to the purchase was that a stream of pure mountain water ran through the tract, and a number of valuable improvements were made in order that the residence and grounds might be supplied with water for culinary, bathing and other purposes. Shortly after these improvements were completed, a mine was opened by defendant on the stream about two miles above the land of S., the water from which, when pumped or flowing naturally therefrom, ran into the stream and so polluted it as to render the water unfit for any of the uses to which S. had adapted it.

Upon the above facts the court below entered a nonsuit, on the ground that, in the absence of negligence or malice, this was *damnum absque injuria*.

Held, that S. had a right of action, and the case should have been submitted to a jury. The exigencies, however, of the great industrial interests must be kept standing in view; the properties of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints, juries should be held with a steady hand: *Sanderson v. Penn. Coal Company*, 86 Penn. St. R., 401.

A party is not liable for the consequences of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, simply because he was influenced in the doing of it by wrong and malicious motives; the courts will not inquire into the motives actuating a person in the enforcement of a legal right: *Phelps v. Newlen*, 72 N. Y., 39; 8 Eng. Rep., 312 note; *Glendon v. Uhler*, 75 Penn. St. R., 467; *Osborn v. Warren*, 44 Conn., 357.

Upon defendant's land was a spring, which was surrounded by an embankment, the effect of which was to raise the water, in a well upon plaintiff's

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land. Defendant, not for his own benefit, but simply with intent to divert the water from plaintiff's well, dug a ditch through the embankment, thus restoring the water to its natural course; the effect of which was to lower the water in the well, to plaintiff's injury. In an action for damages

and to restrain the diversion of the water, held, that the action was not maintainable: *Phelps v. Newlen*, 72 N. Y., 39, distinguishing *Panton v. Holland*, 17 Johns., 92, and limiting *Trustees v. Youmans*, 50 Barb., 316, 45 N. Y., 362.

[6 Chancery Division, 788.]

C.J.B., March 12, 1877.

***Ex parte BARROW. In re WORSDELL. [783]**

Stoppage in Transitu—Unpaid Vendor—Arrival of Goods at Destination—Possession of Carriers also Warehousemen.

Goods were purchased of B. in London by A., residing at Falmouth. On the 27th of October, 1876, B. delivered the goods for shipment on a steamer calling at Falmouth, and on the same day posted an invoice to A. On the 29th of October the steamer left London, and on the 31st arrived at Falmouth, where the goods were discharged on the quay and taken to the warehouse of C., who was the agent of the Steam Packet Company, and in the habit of holding goods landed from the steamers at the risk and subject to the order of the consignees, and also with the exclusive right as between himself and the Steam Packet Company of delivering goods to the consignees.

On the 30th of October A. committed an act of bankruptcy by absconding from Falmouth, and on the 4th of November, 1876, he was adjudicated bankrupt.

On the 4th of November B. telegraphed instructions to C. not to deliver the goods:

Held, that the *transitus* had not ended on the arrival of the goods at Falmouth, and transfer to the warehouse of C., who, in the absence of instructions, held them as forwarding agent, and not as an agent for B. to keep the goods; and, accordingly, that the right of B. as unpaid vendor, to stop the delivery of the goods prevailed as against the claim of A.'s trustee in bankruptcy.

THIS was an appeal from an order of the Truro County Court declaring that certain goods specified in an invoice of the 27th of October, 1876, and purporting to have been sent by Messrs. Barrow & Sons, of Bermondsey, to Jonathan Worsdell, the bankrupt, belonged to and formed a portion of the bankrupt's estate; and ordering delivery of the goods to the trustee in bankruptcy on payment by him of all freight or other lawful charges in respect of the carriage of the goods.

In October, 1876, Messrs. Barrow & Sons, the appellants, who were leather merchants in Spa Road, Bermondsey, received an order from Jonathan Worsdell, of Falmouth, the bankrupt, for goods to the value of £208. Worsdell gave on account of these goods his check for £50, dated the 10th of November, 1876, and promised to accept a bill for the remainder.

On the 27th of October, 1876, Barrow & Sons sent an

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invoice of the goods to Worsdell, stating that the goods (not insured) would leave by next steamer; and on the same 784] day, no directions having *been given by Worsdell as to sending the goods, they sent the goods to the West Kent Wharf, Southwark, for the purpose of being shipped on board the Irish steamer which called at Falmouth.

The steamer Countess of Dublin left London on Sunday, the 29th of October, and reached Falmouth on the 31st. The goods when landed on the quay were taken to the wharf of Carne & Co., wharfingers and agents at Falmouth for the Steam Packet Company.

On the evening of the 30th or morning of the 31st of October the manifest or bill of lading of goods shipped for Falmouth arrived at Falmouth. In this document the names of the consignors did not appear, but the names of the consignees, including Worsdell, for 9 bales and 2 trusses of leather, with the rate of freight and freight to pay were stated.

On the 30th of October Worsdell committed an act of bankruptcy by absconding from his home at Falmouth. On the 2d of November a petition was presented and a receiver appointed, and on the 4th of November Worsdell was adjudicated bankrupt.

On the same day Barrow & Sons, having heard that their debtor had absconded, sent a telegram to Carne & Co., and also wrote to them, to stop the delivery of the goods. The bailiff of the county court endeavored to obtain possession from Carne & Co., but, acting on the advices from Barrow & Sons, they retained the goods. The check was not presented, and the bill for the balance of the purchase-money was never accepted by the bankrupt.

On the 16th of February the judge of the Truro County Court held that the *transitus* was at an end when the steamer arrived at Falmouth, and, accordingly, that the goods were in the possession of Carne & Co., as agents for the consignee, and formed part of his estate, so as to entitle his trustee in bankruptcy as against the unpaid vendors, Barrow & Sons.

From this decision Barrow & Sons now appealed.

Messrs. Carne were examined *viva voce* in the county court, and on the appeal had made an affidavit in which they stated that they carried on business at Falmouth as shipping agents and carriers, and were the agents there for the British and Irish Steam Packet Company.

They also stated in their affidavit that on the arrival of a steamer at Falmouth the goods were discharged at the

wharf of the Falmouth Dock Company into a truck and put into the warehouse *at the Falmouth Docks (as happened in this case), and the course then pursued by them varied according to who the consignees were and what directions they had received from them; and if the goods were consigned to strangers not resident at Falmouth, Messrs. Carne sent them a freight-note which contained the following provision: "Freight and charges payable on delivery. All goods are at consignees' risk after landing, and if not immediately removed will be stored at the expense and risk of the owners. Disputed weight or measurement, claims for loss, damage, &c., cannot be allowed unless a written notice of the same be sent to the office on the day of delivery. All goods are considered as liens not only for freight and charges thereon, but for all previously unsatisfied freight and charges due to the proprietors of this concern by the importers, owners, or consignees."

In the case of consignees living at Falmouth such freight-note was not sent, but, as a matter of convenience, a verbal message was sent instead. As soon as the goods arrived at Falmouth the Steam Packet Company ceased to have anything further to do with the goods, and when landed the goods were placed in the warehouse, where they lay at the risk and subject to the order of the consignee on his paying the freight thereon and warehouse rent (if any). One of the terms of their agency with the Steam Packet Company was that Carne & Co. had the exclusive right of delivering such goods from their warehouse, and this they invariably did on receipt of an order from the consignee, "and in this we act solely on our own account as carriers for the consignee quite independently and apart from our agency for the Steam Packet Company." And generally they delivered or forwarded the goods as soon as received, to another destination, as requested by the consignee, and with the view to their accommodation as much as possible. They sometimes kept a running account with persons in the habit of frequently receiving goods, and from some persons they held a general authority to forward goods as soon as received. As agents for the Steam Packet Company they received the goods to keep for the consignee subject to his order; and on receipt of such order, apart from the Steam Packet Company, they claimed and exercised the exclusive right of delivering the goods and receiving payment for the delivery. "We consider that we throughout act as agents *for the consignee, and except in the case of a notice [786 (such as was sent in this case), we know nothing of the con-

signor." The Steam Packet Company had no kind of control over such delivery, nor over their charges, and the company made no charge for discharging goods into the trucks on the wharf, nor for subsequent storage or carriage. Carne & Co. would be solely liable for damage to the goods whilst being delivered by them, but in the case of damage or injury during the transit from London on board the steamer the loss would fall on the consignor.

Horne Payne, for the appellant: The unpaid vendor has a right, if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or to the person whom he intends to be his agent to take possession of and keep the goods for him; and this right of stoppage overrides the carrier's lien for a general balance, though subject to the carrier's right in respect of special charges on the particular goods: *Oppenheim v. Russell* (1); *Benjamin on Sales* (2). The vendor's right is not affected by part payment, *Hodgson v. Loy* (3); *Feise v. Wray* (4); *Edwards v. Brewer* (5); especially when, as here, the only payment has been by a post-dated and dishonored check, which we say does not amount to part payment. In this case there had been an act of bankruptcy on the part of the buyer so as to justify the exercise of the right by the vendor of the goods at the time when it was exercised: *Benjamin on Sales* (6). Next, the goods did not arrive at their destination until after the act of bankruptcy, and never came into the actual, or even constructive, possession of Worsdell. Carne & Co. received the goods, in their capacity of carriers, for the purpose of forwarding them on to the buyer; and without express directions from him to retain the goods for him at their wharf, they could not of their own will convert themselves into warehousemen so as to terminate the *transitus* without the agreeing mind of the buyer: *James v. Griffin* (7); *Benjamin on Sales* (8). It is not suggested that there was any special communication as to these goods, or any general contract, between the bankrupt and Carne & Co., so as to 787] convert *their position from that of carriers into agents of the vendee to retain the goods on his behalf. The *transitus*, therefore, was not at an end when Barrow & Sons sent their telegram to stop delivery of the goods. They were entitled, on the ground both of the insolvency of the buyer and that the *transitus* was not at an end, to

(1) 8 B. & P., 42.

(2) Page 695.

(3) 7 T. R., 440.

(4) 8 East, 98.

(5) 2 M. & W., 375.

(6) Page 696.

(7) 2 M. & W., 628.

(8) Pages 695, 697, 707.

exercise their right of stoppage, and they have effectually done so.

De Gez, Q.C., and *Northmore Lawrence*, for the respondent, the trustee in bankruptcy: The *transitus* was at end as soon as the goods arrived at Falmouth, the place of their destination. As appears by the invoice and bill of lading, all that was to be done was to put the goods on board the steamer, the owners of which were the only carriers employed, and had completed their contract when they landed the goods on the quay at Falmouth; the despatch to which place was the only voyage agreed upon. Carne & Co. received them, not as carriers, but as agents, to keep them until the further orders of the vendee, and the goods "had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such orders they would continue stationary": *Dixon v. Baldwin* ⁽¹⁾; *Wentworth v. Outhwaite* ⁽²⁾. The delivery to the purchaser took place when the goods were landed on the quay at Falmouth, when the *transitus* prescribed by the vendor was at an end. Anything further would be a *transitus* prescribed by the purchaser, and the right to stop the goods did not after that arrival exist: *Ex parte Gibbes* ⁽³⁾.

BACON, C.J.: All these cases are very nice, no doubt, but notwithstanding the multitude of cases on the subject, there is a very clear principle to be deduced. The facts unquestionably are these: The goods are sold and kept in London to be delivered to Worsdell at Falmouth; the vessel goes to Falmouth, the goods are transferred from the ship to the shore, and that operation is performed by Carne, who is so far the agent of the shipping company. He is not to part with possession of these goods until he gets the freight and charges. *That is clear. They are lying on the [788 quay, and he takes them into a warehouse. I do not think that has very much to do with it. If the weather would destroy or injure them, it would be a very businesslike mode of proceeding that he should take them into the warehouse; but whether on the quay or the warehouse, I think that is the place to which the goods had so far been carried. Whether the *transitus* ended there, so that an unpaid vendor cannot claim his right to stoppage, is what I have to decide. Now the shipping broker says that he sustains two characters. First, he is agent for the shipping company,

⁽¹⁾ 5 East, 174.

⁽²⁾ 10 M. & W., 438.

⁽³⁾ 1 Ch. D., 101; 15 Eng. R., 687.

and then, having got possession of the goods for the shipping company, his next duty is one of a different kind: it is to announce to the consignee that he holds their goods, first, that he may get payment of the freight, and next that he may deal with these goods as the consignee directs him. But until that is done, can it be said that the right is gone? The shipping company would not allow the goods to be parted with until their charges are paid, and therefore the agent would never suffer Worsdell to take them until the charges were paid. He says his course of business would be that a person, if living at a distance, would receive from him a written notice; anybody living in the town would receive a verbal notice. Neither the one nor the other was done in this case. The fact seems to be established that at the time the goods were shot out on the quay the purchaser had absconded, and any notice to him would have produced no result. At any rate, he was not forthcoming. He was not there either to claim the goods or to have a notice given to him that the goods were come, or to direct the fresh destination. That makes the case very different from *Wentworth v. Outhwaite* ⁽¹⁾. In that case not only was there an end of the *transitus* but there had been actual possession. Carts had been sent to carry away one half of the flax, and the other half remained because the purchaser had not time enough or carts enough to carry it away. But the *transitus* was at an end, and he was the owner of the goods, and no other person alive, paid or unpaid, could claim the ownership. In the case decided by myself, *Ex parte Gibbes* ⁽²⁾, the goods upon their arrival at Liverpool were paid for by bills, not good bills, by reason of subsequent failure, but they were paid for. The goods arrived at Liverpool; the [789] purchaser acquired a right from having *accepted the bills and performed the condition to demand from the shipmaster the delivery of the goods. He exercised that right, and I could not adopt the argument that after that they remained *in transitu*. Several extracts have been read to me from Mr. Benjamin's work. Of course that is only to be taken as a learned person's exposition of the law, not as an authority; but it is so clear, and points out so clearly the difficulties which beset this question, and the conclusion which ought to be drawn from decided cases, that I feel myself compelled to refer to it. [His Lordship read from Benjamin on Sales ⁽³⁾: "The other questions, &c. . . ., but all agreed that the sole question was whether the wharfingers were in possession *quod* agents of the buyer."

⁽¹⁾ 10 M. & W., 436.⁽²⁾ 1 Ch. D., 101; 15 Eng. R., 667.⁽³⁾ Page 707.

Now, if Mr. Carne says he was the agent of the buyer, I ask who constituted him that agent? What right had he to make himself the buyer's agent? It was his duty to receive the goods, and it was his duty not to part with them until he was paid for the freight. I do not think it was the less his duty to put them in a place where they could not be injured. Beyond that, he had nothing more to do with him than I had. There was no communication of the intention of the buyer, but the goods remained in Mr. Carne's possession. The unpaid vendor tries to get possession of them, finding that his purchaser has failed and cannot be found anywhere, and that if he does not get them back he will lose their value. The case differs much from the two cases which have been cited, and seems to me to come within the principle of law which is mentioned in Mr. Benjamin's book, and which is supported by the authorities which he refers to, and every other authority that I know of which applies to this subject. The *transitus* was to end at Falmouth, no doubt. The *transitus* might so end that the buyer could acquire possession; but until the buyer does something to evince an intention of possessing them, in my opinion the right of the unpaid vendor to stop these goods, which had never left his hands except to go on board the ship, remained. The order which has been appealed from must therefore be discharged; but as it is a very nice question, indeed, there will be no costs on either side.

Solicitors: *H. Montagu; Gregory, Rowcliffes & Rawle*, agents for Tilly & Co., Falmouth.

See 21 Eng. Rep., 773 note; Audenried v. Randall, 3 Clifford, 99; Durgy v. O'Brien, 123 Mass., 12; Treadwell v. Aydlott, 9 Heisk. (Tenn.), 388; First, etc., v. Pettit, Id., 447; Rosenthal v. Dessau, 11 Hun, 49; Gossler v. Schepeler, 5 Daly, 476; Lessassier v. Southwestern, 2 Wood's C. C. Rep., 35; Rawls v. Deshler, 4 Abb. App. Dec., 12, affirming 28 How. Pr., 66; Wood v. Roach, 4 Dall., 180, 1 Am.

Dec., 276; Parker v. McIver, 1 Desaussure, S. C., 274, 1 Am. Dec., 656; Hsley v. Stubbs, 9 Mass., 65, 6 Am. Dec., 29; Hollingsworth v. Napier, 3 Caines, 182, 2 Am. Dec., 268; Howatt v. Davis, 5 Munf., 34, 7 Am. Dec., 681; Babcock v. Bonnell, 44 N. Y. Superior Ct. R., 568; Loeb v. Blum, 25 La. Ann., 232; Parker v. Byrnes, 1 Lowell, 539; Mohr v. Albany, etc., 106 Massachusetts, 67.

[6 Chancery Division, 790.]

C.J.B., July 23, 1877.

790] *In re MILLER. Ex parte WARDLEY.

Liquidation—Contingent Debt—Payment by Trustees of Premiums on Husband's Life Policies—Proof Based on Estimate—Death of Insured before Receipt of Dividend—Reduction of Proof.

By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay: and the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at £2,052 8s., and a claim for that amount was taken in by the settlement trustees, and in December, 1875, was admitted as a proof. In April, 1876, a dividend of 10s. was declared, but before the amount reached the hands of the settlement trustees, the husband, on the 13th of May, 1876, died. At that time the sums which had been disbursed by the settlement trustees amounted to £766 5s.:

Held, that the settlement trustees were not entitled to receive the whole dividend which had been declared; but only the amount of their payments for premiums with such interest as the dividend had been actually making.

THIS was a motion by way of appeal from the Registrar, sitting as county court judge at Leicester, that an order made on the 2d of May, 1877, might be discharged or varied; and that the proof of John Phillips the younger and three others, which had been allowed for the sum of £2,052 8s., might be expunged or reduced.

By an indenture dated the 7th of October, 1858, and made between John Phillips the elder of the first part, Monica Mary Phillips of the second part, Thomas Miller of the third part, and John Phillips the younger, Ralph Brown, Thomas Goldsborough Anderson, and Joseph Phillips the younger, of the fourth part, being the settlement made prior to the marriage of Thomas Miller and Monica Mary Phillips, it was witnessed that John Phillips the elder, father of the intended wife, covenanted to pay during his life to the trustees an annuity of £400 upon trust that the trustees should out of the said annuity pay all the premiums on five life policies thereafter assigned, or such of them or such part thereof as Thomas Miller should neglect or refuse to pay, and all other the premiums, costs, charges, and expenses 791] which the said trustees *should expend in keeping on foot the said policies, or any other policies which might be effected by the trustees under the provisions thereafter contained; and after such several payments that the said trustees should during the joint lives of Thomas Miller and Monica M. Phillips pay and apply the unapplied portions of the said annuity for the separate use of Monica M. Phil-

lips without power of anticipation, with remainder to her children on attaining twenty-one; and John Phillips further covenanted that his heirs, executors, or administrators would within six months after his decease pay to the trustees the sum of £5,000; and it was declared that the trustees should invest the £5,000 and hold the same, and the income arising therefrom, upon the same trusts as to the income as were thereinbefore expressed with regard to the annuity of £400. It was further witnessed that Thomas Miller assigned to the trustees five policies for £1,000 on his own life, and all moneys to be received by virtue thereof, upon trust to invest the same, and to pay the income to Monica M. Phillips for life for her separate use, with remainder as to the principal for the children of the marriage on attaining twenty-one, with an ultimate remainder to Thomas Miller, absolutely. The deed also contained the following covenants:—

“And the said Thomas Miller doth hereby for himself, his heirs, executors, and administrators, covenant with the said John Phillips the younger, Ralph Brown, Thomas Goldsborough Anderson, and Joseph Phillips, their executors, administrators, and assigns, that he the said Thomas Miller shall and will from time to time and at all times hereafter during his life at his own proper costs and charges regularly pay the annual premiums hereafter to grow due upon or by virtue of the said several policies of insurance hereinbefore assigned or expressed, or intended so to be, as and when the same respectively shall become payable.”

Thomas Miller further covenanted to produce the receipts for the premiums paid; that he would not invalidate the policies; and for further assurance; and then followed this declaration:—

“And it is hereby declared and agreed by and between the said parties to these presents, that in case the said Thomas Miller shall neglect to pay such annual premiums as aforesaid, or any of them, or to produce such receipts or vouchers for the same as aforesaid, within twenty days after such annual premiums become due *respectively, and [792 ought to be paid, as hereinbefore mentioned, then and in such case it shall be lawful for the said trustees or trustee to effect such insurance or insurances in the aforesaid or any other insurance office, and to obtain any other policy or policies of insurance in the name of them the said trustees or trustee or in the name of the said Thomas Miller, and so from time to time to keep the life of the said Thomas Miller constantly insured to the amount at least of £5,000, and to retain and reimburse themselves or himself out of

the said annuity or yearly sum of £400, or out of the interest or annual income of the said sum of £5,000 hereinbefore respectively covenanted to be paid to them or him, all such costs, charges, and expenses as they or he shall expend in effecting or keeping such policies of insurance on foot as aforesaid or in relation thereto."

There was issue of the marriage one child, a son, now of the age of twelve or thereabouts.

John Phillips regularly paid the annuity of £400 up to his death, on the 29th of March, 1871. After his death his executors regularly paid interest at 4 per cent. on the £5,000 to the settlement trustees until they paid off the principal.

Thomas Miller regularly paid the premiums on the policies from the marriage to the 8th of May, 1871, when he presented a liquidation petition.

On the 3d of June, 1871, George Sale Wardley and Thomas Brown were appointed trustees under the liquidation.

On the 7th of October, 1871, and on the same day of every subsequent year up to and including 1875, the trustees of the settlement (hereinafter called the trustees) paid the annual premiums of £163 5s. on the policies out of the income of the £5,000, and paid the balance to Mrs. Miller for her separate use.

The amount of the annual premiums thus deducted from Mrs. Miller's separate income was, without interest, £766 5s.

On the 15th of May, 1874, the trustees carried in a claim against the estate of Miller for £2,086 19s., as the value of his covenant for the payment of the premiums.

In July, 1874, a decree *nisi* for a divorce was pronounced in a petition by Mrs. Miller against her husband. The proof by the trustees had not then been admitted, and on the 17th of August, 1874, the solicitors of the liquidation [793] trustees wrote to the *solicitors of the trustees requesting Mrs. Miller to release her trustees from setting up their claim.

On the 27th of August, 1874, the solicitors of the trustees wrote in answer to say they did not consider the trustees could be absolved by any consent Mrs. Miller might give from proving against the husband's estate. They continued, "But are you sure you should oppose this proof in the interest of Miller's creditors? Are you prepared to say what the settlement trustees should do with the dividend when they get it? There appear to be three courses which might be adopted: 1. To pay the dividend to the insurance com-

pany and get a reduction of the future annual premiums; 2. To invest the dividend at interest, and apply the income annually in payment of the premiums; 3. To invest the dividend at interest and apply the income and part of the principal in payment of premiums so long as the dividends will last. By the two latter courses there would be some possible interest in the dividend remaining to the creditors if Miller died soon."

After further correspondence, on the 24th of August, 1875, the liquidation trustees rejected the proof, but upon application being made to the county court at Leicester, proof was, on the 29th of December, 1875, admitted for the sum £2,052 8s., being the agreed amount (founded on the estimate of two actuaries) which would have been required by the office, on the 8th of May, 1871, to commute all future payments on the policies.

On the 13th of April, 1876, a first dividend of 10s. was declared, and made payable on the 1st of May following.

Before a receipt for this dividend by the trustees (two of whom had gone to the continent) could be signed by them, that is to say, on the 13th of May, 1876, Thomas Miller died.

Thereupon the solicitors of the trustees, on the 15th of May, wrote to the liquidation trustees, saying they presumed that Miller's death would make a difference in the disposition of the dividends under the liquidation. It seemed to the writers that when the premiums that had been paid by the trustees out of Mrs. Miller's income, with interest on them from the time of payment, had been paid to her, the liquidation trustees would be entitled to the balance for the benefit of the rest of the creditors.

*On the 2d of August, 1876, two new trustees of [794 the settlement were appointed.

The liquidation trustees refusing to pay the dividend, the trustees on the 7th of February applied to the court for an order that the same might be paid to them.

On the 18th of April, the liquidation trustees applied to the Registrar to expunge or reduce the proof.

On the 2d of May an order was made on both applications, that the liquidation trustees do pay to the trustees the dividend due to them, with bankers' interest thereon from the 15th of May, 1876.

This was the order from which the liquidation trustees now appealed.

Yate Lee, for the appellants: The order is opposed to two bankruptcy rules; one, that under no pretence shall

any claimant under a bankruptcy be entitled to more than 20s. in the pound; the other that, supposing the proof to have been properly admitted at the time, circumstances have since occurred which show that it ought to be expunged.

This dividend is not trust money; no trust of it is declared by the settlement. The usual form is for the husband first to covenant to pay the premiums, with power to the trustees, if he should fail to effect fresh policies, and keep up the premiums out of income, and (if necessary) capital. Here there is a primary trust to keep up the premiums which the husband should fail to pay on the existing policies, or any other policies which might be effected by the trustees.

[BACON, C.J.: In this instance no other policies have been effected.]

The £5,000 paid by the wife's father's executors is the primary fund; and Miller's estate the secondary fund.

[BACON, C.J.: There is a covenant by Miller with the trustees, which he has broken; for that breach his estate is liable.]

As to reducing the proof: If this dividend be paid to the settlement trustees, they will be getting more than 20s. in the pound for their debt.

795] *[BACON, C.J.: Not out of the bankrupt's estate.]

Beyond this, the facts are, that a proof is admitted on an estimated value, which is agreed upon. Then, before the dividend is paid, some circumstances happen which, if they had happened before the proof was tendered, would have caused it to be rejected. A proof tendered to-day would not be accepted. "Wherever a proof would have been refused, had the facts come before the court when the proof was tendered, it may, if entered, be expunged, on the same facts being shown, and this even though the facts may not actually have happened at the time the proof was entered, if, supposing they had then happened, the proof would have been disallowed": Griffith & Holmes' Bankruptcy (¹), referring to *Ex parte Smith* (²). Where a debt proved became satisfied by a legacy, the proof was ordered to be reduced by the amount of the legacy, *Ex parte Man* (³); and so where bills on other parties held by the creditor as collateral security for the debts proved were paid: *Ex parte Brunskill* (⁴).

(¹) Vol. i, p. 708.

(²) 3 M. D. & D., 341.

(³) Mont. & McA., 210.

(⁴) 4 Dea. & Ch., 442.

De Gez, Q.C., and *Vernon Smith*, for the trustees: This is a covenant by Miller, which has been broken. Its value was estimated by an actuary, and the amount agreed upon. The value cannot depend upon the accident of Miller's death. The principal fund is the husband's covenant, and this dividend is a compensation to the wife for the loss of her income. The court will not decide that the proof is to be reduced by the accident of the life falling in sooner than was expected. According to the argument on the other side, if Miller's life had been prolonged, and Mrs. Miller had gone on paying these premiums to a far larger amount than £1,026 4s., she would have been entitled as against the liquidators to more than her dividend on the £2,052 8s.

BACON, C.J.: I cannot enter into that suggestion.

The fact is that this is a broken covenant upon which damages may be recovered. I must consider the contract between the parties. I have already stated what seems to me to be a just and *proper mode of dealing with [796 this case, which is not without difficulty; and when I suggest that all the trustees can recover is the actual amount of their outlay in the payment of these premiums, their answer is, "Is that the amount for which our debt has been proved?" Well, it is not; but then the court is not precluded from looking at the whole transaction. I find that the husband is to pay the premiums, and in case of his default there is a fund provided elsewhere to keep alive these policies of assurance, in order that the moneys secured by them may be forthcoming. But what trusts are declared of the difference between the sums that the trustees have disbursed and the much larger sum that they claim to receive by way of dividend?

It now appears that in the event that has happened the value of the covenant that was assessed was excessive; but that is no reason why I should refuse to do strict justice to the settlement, and give to the parties under it the benefit of the obligation which the bankrupt's estate was under.

No case, therefore, has been shown for expunging the proof. The full sum which the trustees have disbursed ought to be repaid to them. To that extent the contention of the trustees is right. I think that the liquidation trustees ought to pay to the settlement trustees out of this dividend the full amount which has been paid by them since 1871, and I also think the settlement trustees must have their costs.

As to interest, I do not see my way.

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After some discussion, it was agreed that the settlement trustees should have upon their payments such interest as the fund had been making at the bankers since the declaration of the dividend.

Solicitor for appellants: *G. J. Brownlow*, agent for Watson & Baxter, Lutterworth.

Solicitors for respondents: *Peacock & Goddard*, agents for Thompson, Phillips & Evans, Stamford.

C A S E S
DETERMINED BY THE
 CHANCERY DIVISION
OF THE
 HIGH COURT OF JUSTICE,
AND BY THE
 CHIEF JUDGE IN BANKRUPTCY,
AND BY THE
 COURT OF APPEAL
 ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
AND IN
 L U N A C Y.

[7 Chancery Division, 9.]

V.C.M., April 26, 30; May 1, 2: C.A., Nov. 23, 24, 1877.

*CLARK V. GIRDWOOD.

[9

[1875 C. 37.]

Marriage Settlement—Rectification—Improper Limitations—Husband acting as Wife's Agent—Costs against a Solicitor.

The plaintiff, a widow with children, being possessed of property left by her first husband, married, and marriage articles were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband and the solicitor who prepared the settlement:

Held, by the Vice-Chancellor, that upon the evidence, the limitations were contrary to the intention of the plaintiff, and that the husband, having undertaken as agent for the wife to have a settlement prepared, was bound to have such a contract prepared as the court would sanction, and such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement.

The husband, and the solicitor who prepared the settlement (who in the view of the Vice-Chancellor had failed in his professional duty, and had by his neglect and misconduct caused the litigation), were ordered to pay the costs of the suit:

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Held, on appeal by the solicitor, that as he had not been guilty of participation in a fraud, but at most only of a blunder for which the remedy was an action for professional negligence, there was no jurisdiction to order him to pay the costs of the suit.

THE original bill was filed on the 30th of January, 1875, for the purpose of having the trusts of certain articles of agreement for a settlement made on the marriage of the plaintiff, Jane Adelaide Elizabeth Clark, with the defendant, Arthur Turner Clark, carried into execution under the direction of the court.

By the articles of agreement, which were dated the 6th of November, 1872, and made between Arthur Turner Clark, the plaintiff, Mrs. Clark, then Mrs. George, and two trustees, John Maw Darton and Finlay Thomas Girdwood, after reciting that Clark was possessed of certain policies of assurance effected on his life in America, and of certain freehold properties situate in Virginia and Missouri in the United States, and that Mrs. Clark was possessed of or entitled under the will and codicils of her late husband, James Gilbert George, or otherwise, to certain household furniture and other estate and effects, and that Clark had four children, it was agreed that the said several properties should be conveyed and assigned to the trustees by a proper deed of settlement, upon trust after the marriage to pay the income thereof to "the said A. T. Clark for life, and after his death, or the happening of, the events hereinafter provided," to Mrs. Clark during her life, for her separate use, and after her decease, upon trust to pay the income to Clark for his life, but if he became bankrupt or insolvent, or assigned, charged, or otherwise disposed of the income, then the trust declared in his favor should wholly cease, and after the determination of those trusts the trustees were to divide the corpus or principal of the said real and personal estate among all the children of Mr. and Mrs. Clark then living or thereafter to be born who should attain the age of twenty-one or marry, absolutely in equal shares. And it was declared that the settlement should contain the usual clauses for maintenance and education of children, with power to the trustees to sell the trust estate or any part thereof; and further, that F. T. Girdwood, or any future trustee, being a solicitor, should be entitled to charge the trust estate for any business done and performed, whether strictly professional or not, in relation thereto; and lastly, that the settlement, in case of question, should be settled by the junior conveyancing counsel for the time being of the Court of Chancery.

Girdwood had been repeatedly applied to for a copy of the settlement, and had not produced it.

After the bill was filed the usual order was made for the defendant Girdwood to file an affidavit of documents, but he failed to make such affidavit within the time limited, and the same was not in fact filed until an attachment had been issued against him and lodged with the sheriff, and he did not comply with the directions of the order to deposit the documents with the clerk of Records and Writs until a second attachment was upon the point of being issued. At length, upon the documents being deposited and inspected, the plaintiff became aware that the first life estate in the property was limited to Clark.

The bill was then amended, and it prayed in addition to the relief originally asked, that the plaintiff might be declared entitled for her life, for her separate use, to the whole of the property, estate, and effects comprised in the articles of the 6th of November, 1872, and thereby settled on her part, as also to the income of all *other property, if [1] any, to which she was entitled under the trusts of her settlement made upon her former marriage or the will and codicils of her first husband; and that such articles, if necessary, should be rectified and made conformable with the contract between the parties.

The facts proved sufficiently appear from the judgment of the Vice-Chancellor.

The case came on for hearing before Vice-Chancellor Malins on the 26th of April, 1877.

Higgins, Q.C., and *Ingle Joyce*, for the plaintiff: We submit that the plaintiff is entitled to have the whole of her own property settled upon her for her separate use, and that a proper settlement should now be executed for the purpose of carrying out that object. She could never have intended to give her sanction to such a settlement as this. It seems she understood that all her property was already settled upon herself, except certain furniture and effects of that nature. As she was entirely unprotected and had no legal adviser, it was unjustifiable on the part of her husband to give instructions for such a settlement, and for any solicitor to prepare it without directions from the lady herself. The solicitor, who prepared the document upon no instructions but those of the husband, ought to pay the costs of the suit, which was rendered necessary entirely through his conduct: *Baker v. Loader* ⁽¹⁾.

As the husband alone gave instructions it is the same

⁽¹⁾ Law Rep., 16 Eq., 49; 6 Eng. R., 634.

thing as if he had prepared the settlement, which brings the case within *Corley v. Lord Stafford* (*), where the deed was rectified because it was not a proper settlement according to the rules of the court. In *Cogan v. Duffield* (†) a settlement was rectified upon a bill filed on behalf of the wife, though it was argued that there could be no rectification of a settlement except upon a mistake common to both parties. The same principle was acted upon in *Cooke v. Lamotte* (*), *Rhodes v. Bate* (*), and *Cobbett v. Brock* (*), where deeds were reformed on the ground of misrepresentation or concealment of facts.

[2] **Glasse*, Q.C., and *Bathurst*, for the defendant Clark : The claim made by this bill is that the document may be rectified and made conformable to the intention of one of the parties. The plaintiff alleges her intention to have been that she was to have the first life estate in the property, but that is denied by the defendant, who, on the contrary, alleges that it was by the express wish of the plaintiff that he gave instructions for the property to be settled upon himself in the first instance. The document must be considered to carry out the intention of both parties, for it was read over to the plaintiff, and we have the evidence of Girdwood that she well understood the effect of it. But if not, the court has no power to rectify it, except on the ground that the alleged error was common to both parties : *Sells v. Sells* (*), *Mortimer v. Shortall* (*), *Rooke v. Lord Kensington* (*). In the case of a contract in consideration of marriage the court cannot restore the parties to the position they before occupied, but under special circumstances a deed of separation may be set aside, as in *Evans v. Carington* (*). This principle was also acted upon in *Earl of Bradford v. Earl of Romney* (*). A deed may be set aside on the ground of fraud, but it cannot be rectified unless upon a common misunderstanding by both parties : *Fowler v. Fowler* (*). In the case of a voluntary deed the court acts on entirely different principles, as is shown by *Cooke v. Lamotte* (*). There was a confidential relationship between the parties, and the court will not undo a benefit conferred upon one of the parties unless there be *mala fides* : *Rhodes v. Bate* (*).

(*) 1 De G. & J., 238.

(*) Law Rep., 20 Eq. 789; 15 Eng. R., 607; 2 Ch. D., 44; 16 Eng. R., 700.

(*) 15 Beav., 234.

(*) Law Rep., 1 Ch., 252.

(*) 20 Beav., 524.

(*) 1 Dr. & Sm., 42.

(*) 2 D. & War., 363.

(*) 2 K. & J., 753, 764.

(*) 1 J. & H., 598.

(*) 30 Beav., 431.

(*) 4 De G. & J., 250.

The case of *Corley v. Lord Stafford* ⁽¹⁾ does not apply, because there the barrister, who was the intended husband, prepared the settlement himself. There was no *mala fides* on the part of Mr. Clark. All he did was to have a settlement prepared in order to protect the plaintiff against any liabilities which he might himself incur. This was a careful and proper act on his part.

Cracknall, for the defendant Girdwood.

*MALINS, V.C.: The transactions in this suit are of [13 a lamentable description, and such as no judge can look at without the greatest regret. It seems that Mr. George, a solicitor of reputation, who resided at Monmouth, died in December, 1871, leaving a widow, the plaintiff in this suit, and seven children, and the property left by the testator for the benefit of his widow and children amounted to between £500 and £600 a year, and this property included a residence called Newton Lodge, where the plaintiff was living happily with her children, but in the month of September, 1872, when her husband had been dead only nine months, some infatuation possessed her that she must have another husband, and she then had recourse to an advertisement in a newspaper by which she described her personal attractions and her property in highly advantageous terms. She was then thirty-nine years of age. This advertisement attracted the attention of Mr. Arthur Turner Clark, the defendant, who was a widower with four children, and his history is thus described: He had been engaged in mercantile pursuits up to the year 1862, when he embarked in blockade-running during the American war, and in that year he went to America, as it was said, to protect his interests, and there he remained till June, 1872, when he returned to England. It is clear from the evidence that when he went to America he was in embarrassed circumstances, and it is equally clear that when he returned his circumstances were still embarrassed, since he was unable to pay the various creditors who applied to him for payment of their debts. At this time I think it is evident that he had not sufficient means for the support of himself and his children, and when he answered the plaintiff's advertisement in November, 1872, he no doubt supposed that a marriage with a lady of her means would be of material assistance to him. The answer to the advertisement brought about an interview, and a great intimacy followed between the plaintiff and defendant. The lady seems to have been under an extraordinary infatuation, because she then knew nothing about the defendant; he might have

(1) 1 De G. & J., 238.

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been a pauper or a swindler, for what she knew, and yet she did her utmost to prevent her brothers from making any inquiries respecting him, and she allowed the defendant [14] himself *to write to her brothers, and even threaten legal proceedings against them if they continued those inquiries. The brothers of this lady appear to me to have acted most properly in the matter, and it is a pity the law did not enable them to prevent her from committing this act of folly. However she chose to do so.

On the 4th of November, 1872, she arrived in London, and the marriage was arranged to take place on the 6th, and it was not till the previous evening, about seven o'clock, that the defendant took any steps for the preparation of a settlement. He then called upon Mr. Girdwood, a solicitor, whose offices were in Verulam Buildings, to whom he was introduced by his friend Mr. Darton. At this time the lady was in apartments in Keppell Street, Russell Square. She had no one with her, not even a servant, and she had no person whatever to protect her or to look after her interests. The defendant took upon himself the duty of having a marriage settlement prepared, and he gave instructions for the settlement to Mr. Girdwood, and he having received those instructions, which were not written down, proceeded to prepare the contract. Mr. Girdwood, in his answer, states that he acted on behalf of the plaintiff as well as her intended husband, but in his evidence taken in court he said that this statement was not correct, and that he only acted on behalf of the defendant. The document as at first prepared could not be found fault with, because it gave to the lady the first life estate for her separate use in her own property, and it gave to the husband such property as he had for life, with remainder to his wife.

From the evidence given by Mrs. Clark, and I see no reason to disbelieve her, it appears she was told by Mr. Clark that he had large property in America, that his property was much larger than hers, but it now turns out that all this property was imaginary. He told her, also, that he had certain policies of insurance, but Mr. Clark admits that the policies were of no value, as they were merely agency policies, that is, paid for by agencies; and I do not believe that he really had any property whatever, but, on the contrary, I am satisfied that he was deeply in debt, and in a complete state of insolvency.

Now, under these circumstances, looking at the position of the parties on the 5th of November, what ought to have [15] been done? *Considering that this man had nothing

to settle, and the lady had property and had seven children to support, and that her property was left to her by her former husband for the support of herself and her children, there can be no doubt that it was the duty of Mr. Clark, and the imperative duty of Mr. Girdwood, to see that this lady had her own property secured to her for her separate use. That is what ought to have been done, but by the interlineation inserted by Mr. Girdwood, the first life estate in this lady's property was given to Mr. Clark. Mr. Girdwood says he made the interlineation before the execution of the settlement, and I am willing to believe that he did so, but I think he entirely failed in his duty in not calling the attention of the parties to the fact of that interlineation, and to the result which it would introduce. The extraordinary thing is, that a solicitor should receive instructions from a person he had never seen before to prepare a settlement and deprive the intended wife and her seven children of this property without having any communication with her upon the subject. He might have called upon her as she was living within ten minutes' walk of his chambers, and might have shown her a draft of the document, but instead of this he thinks proper to have the settlement engrossed, and to take it to her for signature on the morning of the 6th of November, an hour only before the marriage was to take place. He then sees her for the first time, and he reads the document over to her. He says she understood the meaning of it; but I am satisfied that she had no notion of what the effect of it was. It could not possibly have been considered by her, because the recital that she had five children only could not have passed unnoticed by her when she had in fact seven children. It proves to me that her mind was so occupied about the approaching marriage ceremony that she was not capable of understanding the terms of the document. It does not rest upon conjecture, because I have the evidence of the lady, who believed everything that was told by Mr. Clark. She heard the settlement read under the influence of the representations made to her by him. She said in her evidence that she had a conversation with him the evening before the marriage took place, when he said he had made a settlement, and had settled her property on her. With that impression on her mind she took it *for granted that the effect of the document was to [16 settle her property on herself. And after the document was signed Mr. Clark said: "You see I have done what is right; I have left you all." He therefore meant that he had not taken anything away from her, and that the marriage would

leave her where she was as to property. Then she stated she had no idea she was parting with her property; she did not understand that Mr. Clark was to be the owner of her property.

I find the result is that this lady has led a life of embarrassment and distress ever since her marriage. Having no difficulties of her own she has been overwhelmed by the embarrassments of Mr. Clark. It is an extraordinary thing that Mr. Girdwood did not think it necessary that the plaintiff should be represented while preparing this settlement, and did not even think it necessary she should have a trustee—for Mr. Darton, the husband's friend, and Mr. Girdwood, the husband's solicitor, were the two trustees.

Now, what are the principles applicable to such a transaction? It is plain from the evidence that the husband undertook the duty of preparing a proper settlement, and a proper settlement is one that is proper having regard to all surrounding circumstances. It is said the instructions to Mr. Girdwood were to follow the form of the settlement made on the occasion of the first marriage with Mr. George. Now it happens that with regard to the settlement of Mr. George's property, the husband had the first life estate, with remainder to his wife by way of jointure, but that arose from the fact that the property belonged to the husband, and he therefore was properly made the first tenant for life, and that was not done with reference to the wife's property. Following that example, Mrs. Clark ought to have been given the first life estate in her property. Therefore, there was a total miscarriage by Mr. Girdwood in not making the settlor, whose property it was, first tenant for life. Did any one ever hear of a widow with seven children marrying a man with no property, and yet giving the whole of her property to him, and by that means pauperizing herself? Because the effect of this settlement is to give the husband the first estate for life, and she had not a penny left. It is true there is a clause carrying the property over [17] in case of insolvency, *or bankruptcy, or assignment; but he might have been in a state of difficulty without being bankrupt or making an assignment, and the woman might have been in the position of not being able to obtain £5 for herself. That was a settlement which the circumstances could not justify. But it is very remarkable that as this lady understood all the property was to be settled on herself, and as she thought it was so settled, it now turns out from the evidence of Mr. Girdwood that that was his understanding also, for he says Mr. Clark told him the bulk of the lady's

property was already settled, and that the rest of the property he wished to have protected against his transactions in America.

Mr. Clark told him that everything was settled upon the lady except the household furniture and effects; and he thought she took nothing else under the will. He did not think, therefore, that he was giving the husband a life estate in any land the lady might have; so, although he used the word "estate," it is plain he did not think that that extended to any interest in land. I have, therefore, the evidence of the lady that the defendant intended she should retain all her property, and I have the representation of the solicitor, the agent and the only solicitor engaged, that that was the intention—the husband was not to have any interest in her property because it was already settled.

Therefore, on the terms of the contract, I am bound to come to the conclusion that the first life estate in this property ought to be in the wife. Assuming that, then comes into operation the rule of this court. Cases were cited by Mr. Glasse, with most of which I entirely agree, that where this court corrects a settlement it must be because it is framed in a manner contrary to the intention of all parties. He cited *Sells v. Sells* (*), where the question was whether the future property of the husband was to be included. The wife's advisers understood it was; the husband's advisers did not so understand it. Therefore, as there was not a contract on both sides that the property of the husband should be included, that falls under the rule that you cannot correct a settlement where the intention of one but not the intention of the other party is shown. I have had cited to me the cases of *Rooke v. *Lord Kensington* (*), [*18 Earl of Bradford v. Earl of Romney* (*), and *Fowler v. Fowler* (*), and they all proceed upon the same principle. In this case, however, I think Mr. Higgins is right in saying that the remarkable case of *Corley v. Lord Stafford* (*) is the one that entirely governs this. There the gentleman, who was a barrister, had been very many years on terms of great intimacy with the lady whom he was about to marry. She was eighty years of age, and he was twenty-four years younger. He undertook to prepare the marriage settlement, and accordingly he did prepare it, but he prepared it in a manner in which it ought not to have been prepared,

(*) 1 Dr. & Sm., 42.

(*) 2 K. & J., 758.

(*) 30 Beav., 431.

(*) 4 De G. & J., 250.

(*) 1 De G. & J., 238.

giving himself a much greater interest than he ought to have had, or than it was the intention of the lady he should have. The point of the decision is that inasmuch as he undertook the duty of preparing the settlement, it was his duty to prepare such a settlement as a conveyancer would have approved, or the court would have directed. Therefore if he undertook to do this duty as between himself and his intended wife, it was his duty to do it properly, and he could not do so unless he dealt with her property according to the rules of the court. Now, therefore, in this case the plaintiff, as I have pointed out, up to the hour of the marriage having had no settlement except that which her intended husband had undertaken to have prepared, he undertaking that duty, undertook to have a proper settlement prepared; and a proper settlement such as is here defined, which a conveyancer instructed to draw it would have drawn, and which this court, if applied to, would have approved under the circumstances, would have undoubtedly limited every part of this lady's property to her own separate use for life without power of anticipation as against the husband. That, and that alone, was the settlement which the law would justify him in making. In *Corley v. Lord Stafford*, the husband's was the hand which prepared the settlement, but it would not have made the slightest difference if he had asked his solicitor to prepare it, because the fact of its being done for him would make it the same as his doing it himself, and although in this case Mr. Clark did not with his own [19] hand prepare the settlement, he employed his *own agent and solicitor to do it, and he is as much answerable for the contents as Mr. Corley was for that which he did with his own hand. From the evidence of the lady, and from the evidence of the solicitor himself, it would appear that the property was intended to be settled upon the plaintiff. Mrs. Clark says she was told that all her property was secured to herself, and I am myself satisfied that she was under that impression when the settlement was read to her on the morning of the marriage. If the contract really was what I believe it to have been, then immediately that Mr. Clark was applied to to correct it, by making Mrs. Clark the first tenant for life of everything, that request ought instantly to have been acceded to. The refusal to accede to that request has led to the whole of the litigation.

Therefore, on the express terms of the contract, I come to the conclusion that the plaintiff was entitled to the first life estate. If the contract is not conclusive on that, then the

rule of the court, as laid down in *Corley v. Lord Stafford* (*) and the other cases, is conclusive. The husband having undertaken to perform the duty of having the settlement prepared, was bound to have only such a settlement prepared under the contract as would give Mrs. Clark the full benefit of the property for her separate use without anticipation. On these grounds I have not a shadow of doubt that she should have been the first tenant for life, and the settlement must be corrected accordingly.

That being the result, there only remains the painful question of costs, which I am afraid are very heavy. The next friend of the lady is her brother, a beneficed clergyman, who has undertaken the responsibility of the suit for her. He ought to be indemnified against costs. How is he to be so? Mr. Clark, I am satisfied, cannot pay. He may have the means hereafter; but as the whole litigation has been caused by himself, and by the improper, unprofessional, and most reprehensible conduct of his agent, Mr. Girdwood, I cannot do otherwise than give a decree with costs against Mr. Clark. There are some parts of Mr. Clark's conduct which I think are not discreditable to him, but the circumstances connected with the entering into this contract are excessively discreditable to him.

*Then I am by no means satisfied with the conduct [20 of the trustee, Mr. Darton. He is a man of respectability, but I am sorry to say I think in this transaction he was guilty of great want of caution. He knew that this man was a widower with four children, that he was destitute and without means of gaining a livelihood. In spite of that he acquiesced in these transactions, to which he ought never to have been a party. He ought to have warned the parties, and to have advised the lady not to get married in such a hurry to a man who could not support her or her children. On this ground I must direct that Mr. Darton must bear his own costs.

The more material question is, what I am to do with Mr. Girdwood. It was stated by his counsel that he would not ask for costs. If he had done so, he would certainly not have got them. However, there is a higher point, whether I am not bound to make him pay the costs. It is legitimate in all these cases to look to the cause of the litigation. Mr. Girdwood never ought to have prepared the contract under the circumstances. I laid down a rule in *Baker v. Loader* (*), which I have not heard questioned, that if solicitors will prepare documents of a grossly improper character,

(*) 1 De G. & J., 238.

(*) Law Rep., 16 Eq., 49; 6 Eng. Rep., 634.

and which never ought to have been prepared, and the preparation and execution of such deeds lead to litigation, the solicitor who is the cause ought to be saddled with the costs. I can have no doubt that the settlement prepared by Mr. Girdwood with the interlineation is one which no solicitor ought to have prepared under the circumstances, and his conduct has been the cause of the whole of this litigation. After the litigation arose, the conduct of Mr. Girdwood is the most incomprehensible I have ever seen. He was one of the trustees of that settlement, which was executed on the 6th of November, 1872. He claimed the possession of the document as trustee, and was perfectly justified in retaining it, and it was his duty to do so; but in the spring of 1874 Mr. Clark asked Mr. Girdwood to let him have a copy of that settlement, and he importuned him to do so, but although he was repeatedly applied to, this request was not complied with. Now Mr. Girdwood held the document as trustee, and he had prepared it as solicitor, 21] and it was his duty, the very first day the *request was made, to comply with it, but down to the institution of this suit Mr. Clark had failed to obtain a copy of his own marriage settlement. Then the plaintiff, being totally in ignorance of what that document was, applied to her solicitors, Messrs. Bloxam, Ellison & Co., gentlemen of the highest standing in the profession, and they wrote to Mr. Girdwood to let them have a copy of this settlement, but this request was refused. The excuse made by Mr. Girdwood, that he was too much occupied in other business to attend to this request, is a mere subterfuge. What his motive was I cannot understand. It is impossible to account for his conduct. At length, for the purpose of obtaining a knowledge of the contents of that settlement, a very short bill was first filed, containing only three pages. After the bill was served upon Mr. Girdwood, an application was made to him to know the contents of the document, but still he refused. Then there was a summons for affidavit of documents. That was resisted. At last the order was made, but it was not obeyed. An attachment was issued, but even then he refused to produce the settlement. What can be said of a solicitor who adopts such a line of conduct as this? If Mr. Girdwood had given the parties a copy of the document at an early period I believe Mr. Clark would have submitted to alter it. When at last the settlement was produced, and the effect of it was discovered, this bill was amended, and has now come on for hearing.

The same elements exist here as existed in the case of

Baker v. Loader (¹). The whole conduct of Mr. Girdwood has been wrong, and this has led to this litigation; therefore, on the principles upon which I acted in that case, he must pay the costs of the suit from the beginning to the end. The decree will be according to the prayer of the bill, inserting the words "without power of anticipation." "That under the circumstances the plaintiff is entitled in equity for her life for her separate use, without power of anticipation, to the property, estate, and effects of or to which she was possessed or entitled prior to and at the date of her marriage with the defendant Clark." And order the defendants Clark and Girdwood to pay costs up to and inclusive of the hearing.

**Higgins*: Mr. Darton desires to retire from the trusteeship, and Mr. Girdwood also. Therefore there should be liberty to apply at chambers for the appointment of new trustees if necessary; although, probably, it will not be necessary, as there are trustees under the plaintiff's former settlement, and also trustees of Mr. George's will.

MALINS, V.C.: Then it will be: "The defendants Girdwood and Darton desiring to retire from the trusteeship, they are removed, and liberty to apply at chambers for the appointment of new trustees, if necessary."

Girdwood, by leave of the Vice-Chancellor, appealed from this decree so far as it made him liable to pay the costs of the suit. The appeal was heard on the 23d and 24th of November.

Cracknall, for the appellant: The Vice-Chancellor went upon *Baker v. Loader* (¹), but I submit that that case goes too far. If a solicitor makes himself a party to a fraud, and an action is brought to impeach the fraudulent transaction, he can, no doubt, be made a party, and costs given against him; but it was never heard of that a person not interested should be made a party to a suit, and costs asked against him, on the ground that the suit was rendered necessary by his having made a blunder. That he is already a party to the suit in another capacity cannot alter the right to relief against him.

Higgins, Q.C., and *Ingle Joyce*, for the plaintiff.

JAMES, L.J.: The appellant was very wrong in not producing the articles when applied for on the part of the plaintiff, and in not furnishing a copy of them, and if the suit had retained its original character it would have been

(¹) Law Rep., 16 Eq., 49; 6 Eng. Rep., 634.

right to make him pay the costs of it. But after the articles had been produced the plaintiff turned the suit into one of quite a different character, a suit to have them rectified. 23] *The husband resisted this; the parties were examined and cross-examined, and ultimately the articles were rectified in spite of the opposition of the husband. We are of opinion that there is no reason for making the solicitor pay the costs of this litigation between the husband and wife, and that to do so would be an extension of the jurisdiction of the court. The court has jurisdiction in cases of fraud, and where a person against whom no relief could otherwise be asked is made a party to a suit on the ground of fraud, it is because the court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been acting participators in the fraud, and it can, therefore, make any party to the fraud pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part. But the court has no jurisdiction to order a solicitor to pay the costs of a suit because it has been rendered necessary by his having made a blunder. If Mr. Girdwood acted as solicitor to the plaintiff and made a blunder, the plaintiff's remedy against him is by an action for professional negligence, and the Vice-Chancellor has gone too far in making him pay the costs of that part of the litigation, which can at worst only be attributed to his having made a mistake. He is in strictness, liable to pay the costs of the first part of the litigation which arose from his not producing the articles, and he ought to receive his costs of the subsequent litigation relating to rectification. We are of opinion, therefore, that upon the whole he ought neither to receive nor pay costs, and that there should be no costs of the appeal.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Bloxams & Ellison*; *H. W. Christmas*; *F. T. Girdwood*.

An attorney, or other party, who is charged with fraudulently procuring the execution of a will or other paper affecting the rights of another, is a proper party to a bill filed to set it aside, although he has no interest under it. He may be charged with the costs, but the bill must, however, pray costs against him: *Brady v. McCosker*, 1 N. Y., 214, affirming 1 Barb. Chy. Rep., 329; *Crofts v. Allman*, 12 Irish Eq. Rep., 451; *Kerr on Frauds* and

Mistakes (1st Am. ed.), 379-382, and cases cited.

He is not, however, a *necessary* party: *Seddon v. Connell*, 10 Simons, 79.

Such an action will not lie against the personal representatives of the person so fraudulently procuring it, merely for the purpose of recovering costs: *Walsham v. Stainton*, 1 Hemming & Miller, 322.

Where a party having a good defence to an action commenced against

him is prevented, by a gross fraud of the plaintiff in the suit and others from setting up that defence, and a judgment is obtained against him without any negligence or fault on his part, it is a case for relief in equity against the judgment.

An attorney who was knowingly a party to such fraud is a proper party defendant: *Huggins v. King*, 8 Barb., 616.

See also *Farrington v. Bullard*, 40 Barb., 518, and cases cited.

An attorney of the court is not a proper party to an action to restrain his clients from the prosecution of a suit, where nothing is alleged against him, except that he was discharging his duty as attorney in prosecuting the action, and no relief but an injunction is demanded against him: *Ely v. Lowenstein*, 9 Abb. Pr. Rep. (N.S.), 38.

[7 Chancery Division, 26.]

C.A., Dec. 1, 1877.

**In re HINDS (a Lunatic).*

[26

Lunacy—Insolvency—Contingent Interest—Close of Insolvency—Pro interesse suo.

In 1854 a person entitled to a contingent future interest in a fund took the benefit of the Insolvent Act, but did not mention this interest in his schedule. In 1876 the contingent interest vested in possession. In the same year he was found lunatic, and shortly afterwards an order was made giving the holder of the fund liberty to pay it into court to the credit of the lunacy, and directing it to be invested and the income paid to the committee. Shortly afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the Chancery Division for its recovery. The court ordered a transfer of the fund as prayed.

On the 19th of April, 1854, Samuel Hinds, being then in prison for debt, filed his petition in the Insolvent Court for his discharge, under the then acts for the relief of insolvent debtors, and on the 20th of April, 1854, the usual order was made, vesting his estate in the provisional assignee.

At that time, under the will of a testator who had died in 1827, a sum of £3,750, Barbadoes currency, was held in trust for Philip Hinds for life, and after his death for all his children who should be living at his decease, in equal shares. Samuel Hinds was one of the children of Philip Hinds, but his contingent interest in this fund was not included in the statement of his property filed in the insolvency.

On the 1st of January, 1876, Philip Hinds died, leaving Samuel Hinds and two other children surviving him.

On the 4th of November, 1876, Samuel Hinds was found lunatic by inquisition, and the Master, by his report, dated the 23d of April, 1877, found that part of his property was £801 5s., being the sterling value of one-third of the above sum of Barbadoes currency, and that the trustee of the will was ready to pay over such £801 5s., with an arrear of interest, as the court should direct.

On the 14th of May, 1877, an order was made on a petition for confirming the Master's report and for consequential directions. The provisional assignee, having obtained information about the fund, wrote to the solicitors having the conduct of the lunacy proceedings, asking them to have the drawing up of the order stayed. The petition was accordingly, by direction of the Lords Justices, placed in the paper again on the 9th of June, 1877, when the provisional assignee appeared by counsel and opposed the carrying over of this fund to the credit of the lunacy. An order was made confirming the Master's report, appointing a committee of the person and estate, giving liberty to the holder of the £801 5s. to pay it into court to the credit of the lunacy, and to pay the arrear of interest to the committee. It was ordered that the £801 5s. when paid in, should be invested in consols and the dividends paid to the committee. And the court being of opinion that the provisional assignee had no right to be heard, ordered him to pay the costs occasioned by the adjournment of the petition.

The provisional assignee then presented a petition in the lunacy, submitting to the jurisdiction, and praying that the fund might be transferred to the account at the bank intitled "The account of the late Insolvent Debtors Court," or that the court would give him leave to take such proceedings as he might be advised in the Chancery Division for the recovery of the fund.

Eddis, Q.C., and *Langley*, for the petitioner: Though the insolvency is closed by 32 & 33 Vict. c. 83, s. 15, the effect of such closing is only to put the insolvent into the *status* of a discharged bankrupt. Now, by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 51, 52, the outstanding property of the bankrupt can be got in and dealt with, and dividends declared, notwithstanding the close of the bankruptcy. The interest of the insolvent in this fund being a 28] contingent interest, and not a mere *possibility vested in the provisional assignee: *Higden v. Williamson* (').

[JAMES, L.J.: It is needless to cite cases to prove that.]

Romer, for the committee: I submit that under 32 & 33 Vict. c. 83, s. 15, the insolvency is closed to all intents and purposes, and no proceeding can be taken under it, no application having been made under sect. 15, sub-sect. 2, to enlarge the time. This is after-acquired property coming in after the insolvency was finally closed.

THEIR LORDSHIPS (James, Baggallay and Thesiger, L.JJ.) considered that the contingent interest of the insolvent

(') 3 P. Wms., 132.

passed by the vesting order, and that the close of the insolvency did not prevent the distribution of the fund among the insolvent's creditors. An order was accordingly made for payment of the costs out of the cash in hand, and for payment of the residue and transfer of the capital as prayed.

Solicitors: *A. S. Twyford; Hollands, Son & Coward.*

[7 Chancery Division, 29.]

M.R., Nov. 19, 1877.

*WINN V. BULL.

[29

[1877 W. 197.]

Agreement for Lease—Stipulation for Formal Contract—Specific Performance—Statute of Frauds.

By a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:

Held, that there was no final agreement of which specific performance could be enforced against the defendant.

On the 16th of March, 1877, the plaintiff and defendant entered into and signed the following agreement for a lease of a freehold house belonging to the plaintiff:—

"An agreement entered into between William Winn (the plaintiff) of the one part, and Edward Bull (the defendant) of the other part: whereby the said William Winn agrees to let and the said Edward Bull agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling house and premises known as 'Westwood,' situate in the Avenue, Southampton, as the same were lately in the occupation of Mrs. Sullivan, at the yearly rent of £180, the first year's rent to be allowed to the said Edward Bull and to be laid out by him in substantial repairs to the property. This agreement is made subject to the preparation and approval of a formal contract."

No formal or other contract was ever entered into between the parties.

The plaintiff's solicitor subsequently sent the defendant's solicitor a draft of the proposed lease containing covenants on the part of the defendant to keep the premises in repair.

The defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the plaintiff insisting that the lease should remain substantially in its original form, whereas the defendant contended that its terms were contrary to the intention of the agreement, and he ultimately *refused to take a lease at [30

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Winn v. Bull.

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all. The plaintiff thereupon brought this action claiming specific performance of the agreement.

In his statement of defence the defendant relied upon the Statute of Frauds, alleging that the agreement was conditional only, and that no final agreement for a lease was ever reduced into writing or signed by him or his agent within the meaning of the statute.

The plaintiff then joined issue, and the action now came on for trial.

Chitty, Q.C., and *Jolliffe*, for the plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing "usual covenants," which would include a covenant to repair; and that the final clause meant nothing more than that the parties should be bound in a more formal manner. They referred to *Rossiter v. Miller* (¹), *Crossley v. Maycock* (²), and *Chinnock v. Marchioness of Ely* (³).

Roxburgh, Q.C., and *Maidlow*, for the defendant, were not called upon.

JESSEL, M.R.: I am of opinion there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, "We will have the terms put into form," then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Now with regard to the construction of letters which are relied upon as constituting a contract, I have always thought that the authorities are too favorable to specific performance. When a man agrees to buy an estate, there are a great many [31] more stipulations *wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid. What is called an open contract was formerly a most perilous thing, and even now, notwithstanding the provisions of a recent act of Parliament—the Vendor and Purchaser Act, 1874—no prudent man who has an estate to sell would sign a contract of that kind, but would stipulate that certain conditions should be inserted for his protection. When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for

(¹) 5 Ch. D., 648; 22 Eng. R., 382. (²) Law Rep., 18 Eq., 180; 9 Eng. R., 727.

(³) 4 D. J. & S., 638.

nothing, but to protect the vendor against that very thing. Indeed, notwithstanding protective conditions, the vendor has not unfrequently to allow a deduction from the purchase-money to induce the purchaser not to press requisitions which the law allows him to make.

All this shows that contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter.

When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the plaintiff says in effect, "I agree to grant you a lease on certain terms, but subject to something else being approved." He does not say, "Nothing more shall be required beyond what I have already mentioned," but "something else is required" which is not expressed. That being so, the agreement is uncertain in its terms and consequently cannot be sustained.

The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities.

*I will take only one of them, *Chinnock v. Marchioness of Ely* ⁽¹⁾. There Lord Westbury says ⁽²⁾: "I entirely accept the doctrine . . . that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties." Then he goes on, "But if to a proposal of offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

That judgment of Lord Westbury's did not require any

⁽¹⁾ 4 D. J. & S., 638.

⁽²⁾ 4 D. J. & S., 645, 646.

approval, but it was approved of by the Court of Appeal in *Rossiter v. Miller* (').

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the defendant.

Solicitors: *Lovell, Son & Pitfield*, agents for Deacon & Co., Southampton; *Stocken & Jupp*, agents for W. J. H. Bull, Southampton.

(') 5 Ch. D., 648; 22 Eng. R., 382.

See 20 Eng. Rep., 200 note; 22 Eng. Rep., 392 note.

A. made an agreement in writing with a city, for a round sum, to provide all materials and perform all labor required in the erection of a public building upon a certain parcel of land according to plans, drawings and accompanying mason's specifications as might be considered necessary for the progress and completion of the building according to the true intent and meaning thereof. The agreement also provided that in case any particulars should be deficient, or not clearly shown by the plans or expressed in the specifications, A. should carry out the general design as directed by a certain committee and the architect, in as thorough a manner as if the same were shown and fully expressed, that it should be lawful for the committee or architect to direct in writing any additions to or deviations from the plans and specifications, and in such case such sums of money should be added to or deducted from the agreed price as the parties to the agreement should judge the increase or diminution to be worth; that no alterations or additions should be paid for unless so directed in writing. The specifications provided that A. should remove the earth from the area of the lot to be covered by the building to the requisite length, breadth and depth for

the basement walls, foundations, etc., that the exterior basement foundation walls should be constructed of large, flat, blue stone, to be faced upon both sides and laid solid in and pointed on both sides with mortar; that the earth beneath the walls should be thoroughly tamped and puddled, and the bottom course firmly bedded upon it; that all the basement walls should commence fourteen inches at least below the basement floor, and as much deeper as necessary to guarantee a firm and solid foundation, the walls to be of the thickness and construction indicated by the drawings. That A. should do any and all other masonry necessary to fully finish and complete all parts of the building according to the true intent and meaning of the plans, drawings and specifications, whether particularly therein described or not.

The plans showed a section of the foundation walls fourteen inches below the basement floor and no more, and did not indicate any piles, nor were any mentioned in the specifications.

In excavating for the foundations, the soil was found to be of such a character as to require, in the opinion of the architect, piles to be driven in to secure a firm foundation for a part of the walls. The architect accordingly furnished piling plans, directed A. to do the work, and orally promised him

that he should be paid for it. A. drove the piles, cut them off, placed coping stones on them and rubble stones on the coping stones up to the line of the foundation walls as shown in the plans. Held, in an action for the work and materials so done and furnished, that parol evidence that the plaintiff made his estimate for the cost of the work based on the plan showing a section which required a depth of only fourteen inches, and that other persons in the same business were accustomed to make estimates in the same manner, was incompetent; that the defendant was not bound by the oral promise of the architect that the work should be paid for, and that the action could not be maintained: *Stuart v. City of Cambridge*, 125 Mass., 102.

On 7th November, 1871, plaintiff executed two similar contracts to build two bridges, which, though purporting to be, were not executed by defendants, agreeing to do the work in accordance therewith, and with the descriptions in the specifications attached, at certain stated prices, with a drawback of 15 per cent. to be retained till after completion.

The contracts contained clauses that the same prices were to apply to any change or alteration of the work duly authorized by the board of works; that the whole work was to be executed to the satisfaction of defendants' engineer in charge and of the board of works, and that in case of dispute the engineer's decision was to be final. The plaintiff put in a superior class of masonry work to that called for by the specifications, without the authority of the engineer or board of works, but that he did so, as he stated, from encouragement received from individual members of the council that the city would not let him lose thereby. In September, 1872, in consequence of the plaintiff's representation of the general increase of cost, defendants paid plaintiff the drawback. Subsequently he wrote to the council complaining of the loss he had sustained by the increase in the price of iron, and by putting in the better materials, and requested to be paid on a valuation. The defendants refused to assent to this, but

agreed to pay for the increased price of the iron on plaintiff and his sureties agreeing, except as to the iron, to complete the work at the contract prices. On 4th July, 1873, an agreement to this effect, under seal, reciting the two previous contracts, was executed by both the plaintiff and defendants, and defendants paid the plaintiff \$20,000, which he was then out of pocket on the iron. The work proceeded, and plaintiff was paid from time to time on the engineer's certificates until December, 1873, when he again wrote asking for a valuation for the same reasons as before, but nothing was done on this. Subsequently the engineer granted his final certificate, on which plaintiff was paid. It appeared that the engineer had omitted a sum of \$1,882.60 which he had agreed the plaintiff should be paid, and which another engineer appointed by defendants to make certain measurements and valuations found to be due to the plaintiff. On a reference to arbitration the arbitrator found that plaintiff was entitled to this sum, as also to \$6,898 for the superior masonry work. Held, on appeal from the award by Hagarty, C. J., that the plaintiff was entitled to the first item but not to the last, for that there was no evidence of any agreement to pay other than the contract prices, and that what took place with the individual members of the council could not affect the matter, nor could plaintiff set up the defendants' non-execution of the contract, at all events after the agreement of 1873: *Goodwin v. Corporation of City of Ottawa*, 28 Upper Canada Com. Pl., 561.

Where the owner of real estate wrote to his agent that he would sell the same at a price named, whereupon the plaintiff agreed to purchase, it was held, that the possession of the letter by the agent was not sufficient to take the case out of the operation of the statute of frauds.

The execution of a deed without delivery in such sense that the grantee acquires control of it, does not constitute a compliance with the statute, even though the grantee may temporarily have it in his possession: *Steel v. Fife*, 48 Iowa, 99.

[7 Chancery Division, 33.]

V.C.B., Nov. 9, 1877.

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*FENTON V. WILLS.

[1875 F. 66.]

Administration—Costs—Lapsed Share of Personality—Exoneration.

A testator bequeathed a sum of consols and the residue of his personal estate to trustees to hold in equal fifths upon certain trusts. One fifth share lapsed. In a suit for the administration of the testator's real and personal estate :

Held, that the costs of the suit were payable out of the general personal estate, and not primarily out of the lapsed share.

Trethewy v. Helyar (¹) followed.

DAVID FENTON, by his will, dated the 20th of November, 1828, devised and bequeathed all his real estate and a sum of £10,800 consols and the residue of his personal estate, not including in the term "residue" the said £10,800 consols, to trustees to hold in equal fifths upon certain trusts for the benefit of his children and their issue.

The testator died in 1831. A suit to administer his real and personal estate was commenced in February, 1875, and a decree was made in July, 1875. One of the fifth shares had lapsed.

The suit now came on to be heard on further consideration, the only question being whether the costs of the suit were to be borne primarily by the lapsed share or by all the shares ratably, that was to say, by the general personal estate.

Hemming, Q.C., and *Jolliffe*, for the next of kin: The case in principle is undistinguishable from *Trethewy v. Helyar* (¹), where the Master of the Rolls held that the costs of an administration suit could not be thrown primarily upon a lapsed share of residuary personality, but must be paid in the first instance out of the personal estate. He shows conclusively that there can be no residue proper until all costs and expenses have been paid. It is true that in *Scott v. Cumberland* (²) and *Gowan v. Broughton* (³) Vice-34] Chancellor Malins expressed a contrary *opinion; but *Scott v. Cumberland* (⁴) was a case of real estate, and in *Gowan v. Broughton* (⁵) the opinion of the Vice-Chancellor was a mere *dictum*, unnecessary for the decision of the case.

Kay, Q.C., and *Warmington*, for the plaintiffs, took no part in the arguments.

Sir H. Jackson, Q.C., and *H. Burton Buckley*, for the

(¹) 4 Ch. D., 53; 19 Eng. Rep., 662. (²) Law Rep., 18 Eq., 578; 11 Eng. R., 546.

(³) Law Rep., 19 Eq., 77; 11 Eng. Rep., 687.

children of a tenant for life who took shares under the will: No doubt there is a conflict of authority, but *Scott v. Cumberland* and *Gowan v. Broughton* are in our favor. So also is *In re Ham's Trust* (¹), which was not cited before the Master of the Rolls. *Trethewy v. Helyar* (²) is also distinguishable from this case. It was a simple gift of residue. Here there is a specific bequest of personalty and residue to a class in shares, and the lapsed share, therefore, must exonerate the other shares.

B. B. Rogers, Batten, J. Beaumont, and W. Erskine, for other parties.

BACON, V.C.: Although this case is not identical with *Trethewy v. Helyar*, it is so nearly identical that there should be no difference between them. In that case the judgment of the Master of the Rolls was very plain, and was given after considering all the authorities, except *In re Ham's Trust*, which does not seem to have been mentioned. He acted on the well settled principle that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of a testator. The court is now called upon to decide whether the costs of this administration suit are to be paid out of the lapsed share or out of the general personal estate. I cannot see any difference in principle between this case and *Trethewy v. Helyar*. I do not undertake to reconcile the difference which exists in the authorities. I can only decide this case by applying *to it the principle I have referred to. Dealing, there- [35 fore, with this case as a question of principle, and guided by that principle and not only by the authorities, I am of opinion that the costs of this administration suit must come out of the general personal estate.

Solicitors: *Armstrong & Lamb; Linklaters & Co.; Courtenay & Croome; J. H. Lydall; J. Letts; W. Bristow.*

(¹) 2 Sim. (N.S.), 106.

(²) 4 Ch. D., 53; 19 Eng. Rep., 662.

[7 Chancery Division, 36.]

V.C.H., Aug. 2, 1877.

36]

**In re MITCHELL'S TRADE-MARK.*

Trade-mark—Single Letter—Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), ss. 1, 10—Trade Marks Registration Amendment Act, 1876 (39 & 40 Vict. c. 38), s. 1.

A single letter cannot be registered as a trade-mark under the Trade Marks Registration Acts.

THIS was an application by way of motion on behalf of the firm of Messrs. William Mitchell, of Birmingham, steel-pen manufacturers, that the register of trade-marks might be rectified by entering thereon the name of the applicants as the proprietors of twenty-three trade-marks, each of which consisted of a single letter of the alphabet raised in relief upon one of their steel pens, and indicating a particular sort of pen, the whole twenty-three comprising the various letters of the alphabet from A to W inclusive, the letter A being the particular trade-mark in respect of which this application was made.

The evidence in support of this application showed that the trade-marks which Messrs. Mitchell now sought to register had been used by their firm, and recognized by the trade as the marks of their firm for about thirty years; that the Messrs. Mitchell had duly made application to the Registrar of Trade-marks, and had duly advertised their application for three months in the official paper, the *Trade Marks Journal*, in compliance with the provisions of the Trade Marks Registration Act, and the rules thereunder, without any person coming forward in opposition; but that the Registrar had declined to register the marks on the ground that, under the acts of 1875 and 1876, a single letter could not be registered as a trade-mark. The present application was made under the 5th section of the act of 1875, and rules 42 and 43 of the Rules thereunder.

The portions of the acts upon the construction of which the questions principally turned were, the 1st section of the Trade Marks Registration Act, 1875, by which was established "a register of trade-marks, as defined by this act;" the 10th section of the same act, which is, so far as is material, as follows:—

37] * "For the purpose of this act:

"A trade-mark consists of one or more of the following essential particulars; that is to say,

"A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

"A written signature or copy of a written signature of an individual or firm; or

"A distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also

"Any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this act, may be registered as such under this act."

The preamble of the Trade Marks Registration Amendment Act, 1876, which refers to the provision of the principal act, that a person shall not be entitled to institute proceedings to prevent the infringement of any trade-mark, "as defined by the principal act, until and unless such trade-mark is registered in pursuance of that act;" and the 1st section of the Amendment Act, which, so far as is material, is as follows:—

"From and after the 1st day of July, 1877, a person shall not be entitled to institute any proceeding to prevent, or to recover damages for the infringement of any trade-mark, as defined by the principal act, until and unless such trade-mark is registered in pursuance of that act, or until and unless with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade-mark before the passing of the principal act, registration thereof as a trade-mark under the principal act shall have been refused as hereinafter is mentioned."

Theodore Aston, Q.C., and *W. Barber*, for the applicants: Every mark which was a trade-mark entitling its proprietor to protection before the passing of the act of 1875, may be registered as a trade-mark under that act: *In re Barrows' Trade Marks* (*).

In that case the trade-mark admitted to registration consisted of the three letters B B H, while the use of a [38 single letter twice repeated as a trade-mark has also been protected: *Ransome v. Bentall* (*); *Kinahan v. Bolton* (*). If so, why should not the use of a single letter be protected?

Before *Hall v. Barrows* (*) it was questioned whether there could be any property at all in a trade-mark; that case decided that the jurisdiction of the court with regard to trade-marks rested upon property; and a clear defini-

(*) 5 Ch. D., 353; 22 Eng. R., 127.

(*) 3 L. J. (Ch.), 161.

(*) 15 Ir. Ch. Rep., 75.

(*) 4 D. J. & S., 150.

tion of a trade-mark is given in the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88). By the 1st section of that act it was enacted that the expression "trade-mark" should include "any and every name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark lawfully used by any person to denote any chattel," as being of his manufacture; and to forge or falsely apply any such mark with intent to defraud was made a misdemeanor; while by the 11th section of the same act the provisions therein concerning any act thereby declared to be a misdemeanor were not prejudicially to affect any right to which the person aggrieved was entitled either in law or in equity. Thus before the Trade Marks Registration Act a single letter might be a trade-mark, in the use of which the proprietor was entitled to protection, and the use of which in fraud of his right would subject the wrongdoer to criminal proceedings. Then by the act of 1875 two classes of trade-marks may be registered: first, the things defined by the act to be trade-marks; secondly, things which were trade-marks before the passing of the act; and though we contend that every person who had prior to the 13th of August, 1875, the exclusive right to any trade-mark, has a right to register it, even though it does not come under the definition of a trade-mark given in sect. 10 of the act of 1875, the trade-marks ought to be registered in the present case, i.e., a single letter does come within the words of the act. The plural word "letters" in sect. 10 must be held to include a single letter, if not, the expression "combination of letters" used immediately afterwards would be unnecessary. Again, in the enactment in the same section as to the marks in use before the act, the word "letters" is used, 39] and here the word "combination" does not govern the word "letters," but only the word "figures," which immediately follows it. These marks, which each consist of a single letter, ought accordingly to be admitted to registration.

Rigby, for the Registrar of Trade-marks: The contention that every trade-mark which was the subject of property before the Trade Marks Registration Acts is entitled to registration under them is displaced by the acts themselves. The 1st section of the act of 1875 establishes a register, not of trade-marks in general, but of trade-marks "as defined by this act"; the 10th section defines what is to be a trade-mark "for the purposes of the act"; only such marks as are so defined can be registered, and a single letter is not one of them. The Amendment Act of 1876 shows still more

clearly that it is not every trade-mark which is to be put on the register. The preamble speaks of "any trade-mark as defined by the principal act." The 1st section repeats the same expression as applied to things the registration of which has been allowed, but uses the expression "device, mark, name, combination of words, or other matter or thing in use as a trade-mark before the passing of the principal act," as applied to things the registration of which has been refused; thus showing that there were in the contemplation of the Legislature two classes of cases, one in which registration has properly been allowed, the other in which registration has properly been refused, although refused as to a mark in use before the principal act. Thus we are remitted to the definition contained in the principal act. The general proposition, as an authority for which *In re Barrows' Trade Marks* (') was cited, is inconsistent with the acts; and that case was appealed, but on the opening of the appeal a suggestion was made by the court which had the effect of reconciling the parties, and the appeal was not proceeded with. No member of the court, however, showed any leaning to the doctrine that a trade-mark used before the act was entitled to registration, whether within the definition of the act of 1875 or not, and it cannot be considered that there is any binding decision to that effect. The Registrar of Trade-marks is, under the 68th *sec- [40 tion of the Rules under the Trade Marks Registration Act, bound to conform to the directions of the Commissioners of Patents, and they have directed him not to register as a trade-mark a single letter; their decisions are, however, not intended to be final, but to be open to revision by the court. Then as to definitions contained in the acts. Under sect. 10 of the first act a trade-mark must consist of certain "essential particulars," i.e., first, certain things, "to which may be added," amongst other things, "any letters" or "combination of letters." So that a word or combination of letters not used before the act cannot be registered alone without the other essential particulars: *Ex parte Stephens* ('). Secondly, "any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this act." So that the two classes are not, first, the defined, and secondly, all others, but all are defined; and, moreover, the word "combination" governs the word "letters" as much as the word "figures." Even if not, the words "special and distinctive" govern the word "letters," and the twenty-three first

(') 5 Ch. D., 353; 22 Eng. Rep., 127.

(') 3 Ch. D., 659; 22 Eng. Rep., 132.

letters of the alphabet cannot be said to be either special or distinctive. A single letter, therefore, cannot be admitted to registration.

HALL, V.C.: I am of opinion that, according to the true construction of the Trade Marks Registration Acts, 1875 and 1876, this application cannot be granted.

The definition of that which, for the purposes of the act, is to be a "trade-mark" is given in the 10th section of the act of 1865. That section, so far as is material, refers to two descriptions of trade-marks; one is "a distinctive device, mark, heading, label, or ticket," to which may be added "any letters, words, or figures, or combination of letters, words, or figures"; the other is "any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of this act."

The trade-mark which the applicants in this case seek to register is not within the first of these definitions, nor is it [41] within the other "a special and distinctive word, or combination of figures or letters." As I read the words "combination of figures or letters used as a trade-mark before the passing of this act," the word "combination" is associated with the word "letters" as well as with the word "figures." Therefore, upon the true construction of the act, no provision is made for the registration of a single letter.

Solicitors for representatives of W. Mitchell: *Thomas White & Son.*

Solicitors for the Registrar of Trade-marks: *Hare & Fell.*

[7 Chancery Division, 42.]

Fry, J., Nov. 5, 1877.

42]

*HART V. SWAINE.

[1876 H. 421.]

Rescission of Contract—Setting aside Sale of Land after Conveyance—Fraud—Misrepresentation—Copyhold Land sold as Freehold.

A vendor sold land as freehold, received the purchase-money, and conveyed the land as freehold. Afterwards the purchaser, for the first time, discovered that the property was really copyhold. The vendor alleged that he made the representation believing it to be true:

Held, that, assuming that he had made the representation *bona fide*, the vendor had committed a legal fraud; that the sale must be set aside and the purchase-money repaid with interest; and that the vendor must pay all the expenses which the purchaser had incurred in consequence of the purchase.

THIS action was brought to set aside a sale of a piece of land by the defendant to the plaintiffs, on the ground that

the land was represented by the defendant to be of freehold tenure, whereas it was in fact copyhold.

The land in question was a field containing about four acres. On the 22d of February, 1876, the defendant entered into a written agreement with the plaintiffs to sell the piece of land to them for £450, the land being described in the contract as freehold. A deposit of £50 was paid by the plaintiffs. An abstract of title was furnished by the defendant, which showed a good freehold title to the property. The title was accepted by the plaintiffs, and on the 24th of June, 1876, the balance of the purchase-money was paid, and the defendant executed a conveyance of the land to the plaintiffs as freehold. The conveyance contained a covenant by the defendant with the plaintiffs, that, notwithstanding any act, deed, or thing by the defendant done or executed or knowingly suffered to the contrary, he had good right to grant the hereditaments and premises thereby granted, or expressed so to be, unto and to the use of the defendants, their heirs and assigns, in manner aforesaid.

In August, 1876, the plaintiffs advertised the land for sale by auction in lots. The steward of the manor of which the land was held saw the advertisement, and gave notice to the plaintiffs that the land was copyhold, and it was ascertained that this was *the fact. The plaintiffs, in consequence [43 of this, were unable to go on with the intended sale. This action was then commenced, by which the plaintiffs claimed to have the sale to them set aside, and the agreement of the 22d of February, 1876, and the conveyance of the 24th of June, 1876, cancelled; that the defendant might be ordered to repay the purchase-money with interest, and also that he might be ordered to pay damages and the costs of the action. This was the trial of the action. By the defendant's evidence it appeared that he purchased the land in question (together with some other property consisting of a house and garden) in the year 1871, from one Thomas Chamberlain. In the contract for that purchase the property purchased was described as "a freehold house and premises and four acres of land, about three-fourths freehold and one-fourth copyhold." The abstract of the vendor's title, which was then delivered, commenced with the will dated the 28th of October, 1817, of one William Piddle, who devised certain property to his wife for her life, with remainder to his daughter Ann Piddle (afterwards Ann Chamberlain), the mother of Thomas Chamberlain, her heirs and assigns forever. Thomas Chamberlain claimed by descent from his mother. There was nothing in the abstract of title to show

that any part of the property sold was copyhold. The abstract of title delivered by the defendant to the plaintiffs was the same as that which he had received from Chamberlain, with the addition of the conveyance to himself.

After the agreement had been entered into it was represented by Thomas Chamberlain to the defendant that only about one-quarter of an acre of the field of four acres was of copyhold tenure. This portion being so small in proportion to the whole, the defendant determined to have the whole property conveyed to him as freehold, so as to save the expense of being admitted, and a conveyance of the whole property was accordingly executed to him by Chamberlain as freehold on the 22d of June, 1871. The defendant did not search the rolls of the manor, or make any other inquiry, with the view of ascertaining whether any part of the land was copyhold. Soon after the purchase was completed he sold the house and garden to a Mrs. Swannell, and after this he remained in undisturbed possession of the field of 44] four acres *until he sold it to the plaintiffs, no demand for any quit-rent being made upon him. He therefore came to the conclusion that, either no part of the property which he had purchased from Chamberlain was copyhold, or that the copyhold part was included in that which he had sold to Mrs. Swannell, and he made the representation to the plaintiffs that the field which he sold to them was freehold, in the *bona fide* belief that it was so.

It appeared that the four acres were in 1854 (after the deaths of the widow of the testator and his daughter Ann Chamberlain), upon the inclosure of some common land, allotted to James Chamberlain, the father of Thomas Chamberlain, in respect of other copyhold land of which he was tenant as guardian to Thomas Chamberlain, who was then an infant, so that the allotment became, by virtue of sect. 94 of the Inclosure Act of 1845 (8 & 9 Vict. c. 118), itself copyhold. Thomas Chamberlain was the customary heir of Ann Chamberlain. No mention of this allotment appeared upon the abstract of title furnished on the occasion of the purchase by the defendant from Chamberlain, nor upon the abstract furnished by the defendant to the plaintiffs. It appeared also that, prior to the sale to the plaintiffs, the defendant had, early in the year 1876, put up the four acres for sale by public auction, and that on that occasion a Mr. Smith publicly stated in the auction room that the land was copyhold, not freehold. No sale was then effected, the reserved bidding not having been reached.

Fischer, Q.C., and *W. B. Heath*, for the plaintiffs: The

plaintiffs bought the property on the faith of the defendant's representation that it was freehold. This representation being untrue, the sale ought to be set aside. *Edwards v. M'Leay* (*) is an authority for giving the relief we ask. The defendant ought also to pay as damages the expenses of the attempted sale by the plaintiffs.

[They were stopped by the court.]

Cookson, Q.C., and *C. Browne*, for the defendant:

[FRY, J.: I see no evidence of actual fraud on the part of *the defendant; he has only made a mistake. But [45 as he has taken upon himself to assert that the land is freehold, am I at liberty to look into the state of his mind?]

This is really an action for deceit, and in such a case it is essential to prove actual personal fraud by the defendant: *Wilde v. Gibson* (*); Sugden's Law of Property (*). Where the contract for sale has been carried out by the execution of a conveyance, the transaction cannot be set aside unless wilful misrepresentation amounting to fraud is proved. In *Edwards v. M'Leay* (*) Lord Eldon based his judgment upon the principle that "if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this court will rescind the contract." That, therefore, was a case of wilful fraud. In *Legge v. Croker* (*) Lord Manners said: "If it were a wilful misrepresentation the plaintiff might be entitled to relief; but where the parties have expressed their meaning by a lease, that has been, with due deliberation, executed, and where there is no wilful misrepresentation, nor any mistake in omitting to introduce a covenant respecting this right of way into the deed, it would be very dangerous to correct this deed upon such slight grounds." There is no authority for setting aside an executed contract on the ground of misrepresentation not fraudulent. At any rate, the expenses of the attempted sale by the plaintiffs are not damages resulting from the misrepresentation.

Fischer, in reply: Wilful personal fraud is not necessary to set aside a contract which has been carried out by a conveyance. In *Rawlins v. Wickham* (*) an executed agreement for a partnership was rescinded, on the ground that the plaintiff had been induced to enter into it by a misrepresentation of the amount of the debts of the concern; and it was held that the estate of a deceased partner who had joined in making the representation, but who had done so in

(*) Coop., 308; 2 Sw., 287.

(*) 1 H. L. C., 608.

(*) Pages 597, 614.

(*) 2 Sw., 289.

(*) 1 Ball & B., 508, 514.

(*) 3 De G. & J., 304.

the *bona fide* belief that it was true, must indemnify the plaintiff against the debts of the concern.

46] *FRY, J.: In 1871 the defendant agreed to purchase this and other property from Chamberlain, one-fourth part being described in the contract for sale as copyhold. The defendant had, therefore, full notice that part of the property which he then bought was copyhold, and this was enough to put him upon inquiry as to the facts. He says that what subsequently happened led him to suppose that less than one-fourth of the property was copyhold; and he entertained a vague notion either that no part of what he had bought was copyhold, or that the copyhold part was that which he afterwards sold to Mrs. Swannell. This notion, however, did not discharge him from the burden which lay on him to make inquiry as to the real nature of the tenure in case he should sell the property again. Instead of doing this, he sold the land as freehold, and the plaintiffs bought it as such. The abstract of title which he furnished to them represented the land as having passed under the will of William Piddle. The land which he sold did not pass under that will, though that in respect of which it was allotted may have done so. It appears to me that both the allegation in the contract that the land was freehold and the allegation in the abstract that it passed under the will of Piddle were false in fact, though I do not say that the defendant knew them to be so. It now appears that the whole of the four acres was allotted in 1854 to Chamberlain as copyhold in respect of other copyhold land which he held. No trace of this transaction appeared upon the abstract, and there was nothing to put the plaintiffs upon inquiry. The defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this believing it to be true, the result appears to me to be that which is expressed in the judgment of Maule, J., in *Evans v. Edmonds* (¹), where he says: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he 47] takes upon himself to warrant his *own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraud-

(¹) 13 C. B., 777, 786.

ulently made." That is to say, the defendant having taken upon himself, with a view of securing a benefit to himself, to assert that the property was freehold, has, in the view of a court of law, committed a fraud. The same principle is laid down by Turner, L.J., in *Rawlins v. Wickham* (*), where he says: "If upon a treaty for purchase one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he surely cannot be heard to say that he knew nothing of the truth or falsehood of that which he represented, and still more surely he cannot be allowed to retain any benefit which he has derived if the representation he has made turns out to be untrue. It would be most dangerous to allow any doubt to be cast upon this doctrine."

It appears to me, therefore, that in this case there has been a legal fraud committed by the defendant, which has resulted in the sale to the plaintiffs, and that I am bound by the authorities to give the plaintiffs the relief which they ask. The judgment will be to set aside the sale to the plaintiffs, and declare that the deed of the 24th of June, 1876, is inoperative. A memorandum of this judgment must be indorsed by the Registrar on the deed, and then it and the other documents of title in the plaintiffs' possession will be delivered up to the defendant. The defendant must repay the purchase-money, with interest at 4 per cent. from the time of payment, after deducting the amount of the rents and profits derived by the plaintiffs from the land during their occupation of it. And then I shall direct an account, as in *Edwards v. M'Leay* (*), of the expenses incurred by the plaintiffs in consequence of the purchase of the land; and the defendant must pay the amount thus found due, as well as the costs of the action.

Solicitors for plaintiffs: *Hawks, Willmott & Stokes.*

Solicitors for defendant: *Denton, Hall & Barker.*

(*) 8 De G. & J., 316, 317.

(*) 2 Sw., 289.

Where a party is induced to enter into a contract for the purchase of lands, relying upon material representations on the part of the vendor, which prove to be untrue, he is justified in refusing to perform, although the representations were not made with fraudulent intent, but through a mistaken belief as to their correctness. It is not necessary in such case for defendant to show he has sustained actual damage: *Phillips v. Conklin*, 58 N. Y.,

682; *Sweezy v. Collins*, 36 Iowa, 589; *Gale v. Hubert*, 6 Grant's (U.C.) Chy., 312; *Crosby v. Buchanan*, 23 Wall., 420, 456-8.

See, however, *Mamlock v. Fairbanks*, 46 Wisc., 415.

An action for fraudulent representations, as a general rule, cannot be maintained without proof that defendant believed, or had reason to believe, the representations to be true when made, and they were made with fraud-

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ulent intent: *Stitt v. Little*, 63 N. Y., 427.

Arkansas: *Righter v. Roller*, 31 Ark., 170.

Canada, Upper: *French v. Skeid*, 24 Grant's Chy., 179.

Illinois: *Fauntleroy v. Wilcox*, 80 Ills., 478; *St. Louis, etc., v. Price*, 85 Ills., 406; *McBean v. Fix*, 1 Bradwell, 177.

Iowa: *McKown v. Furguson*, 46 Iowa, 636.

Ireland: See *Sankey v. Alexander*, *Irish R.*, 9 Eq., 259.

Massachusetts: *Morse v. Shaw*, 124 Mass., 59; *Tucker v. White*, 125 Mass., 344.

Michigan: See *Bristol v. Braidwood*, 28 Mich., 191.

Missouri: See *Dunn v. White*, 63 Mo., 181.

New York: *Wakeman v. Dalley*, 51 N. Y., 27; *Oberlander v. Speiss*, 45 N. Y., 175; *Meyer v. Ammidon*, 45 N. Y., 169; *Marsh v. Falkner*, 40 N. Y., 562, 575; *Duffany v. Ferguson*, 66 N. Y., 482, 484; *Hubbell v. Meigs*, 50 N. Y., 480; *Simar v. Canady*, 53 N. Y., 298; *Atkins v. Elwell*, 45 N. Y., 753, 760-1; *Weed v. Case*, 55 Barb., 534; *Brainard v. Spring*, 42 Barb., 470, 477; *Pope v. Hart*, 35 Barb., 636; *Furman v. Tibus*, 40 N. Y. Superior Ct. R., 284; *Morehouse v. Yeager*, 41 N. Y. Superior Ct. R., 135; *Marshall v. Gray*, 39 How. Pr., 172.

Ohio: *Taylor v. Leith*, 26 Ohio St. R., 428; *Parmlee v. Adolph*, 28 Ohio St. R., 10.

Pennsylvania: *Duff v. Williams*, 85 Penn. St. R., 490.

The vendor of land is responsible for material misrepresentations in respect to its location and qualities, made by his agent without express authority, and in the absence of any actual knowledge, by either the agent or the principal, whether the representations were true or false: *Bennett v. Judson*, 21 N. Y., 238.

This case and the doctrine of similar cases furnish an exception to the general rule which it is difficult to correctly formulate. After a careful reading of the cases we give the following as the result:

One who, without knowledge of the truth or falsity of material facts, when conscious that he has no such knowl-

edge, makes a material misrepresentation of such facts, as of his own knowledge, in such a manner as to import knowledge in him thereof, if such misrepresentations are made to another with the intent that he shall rely on them, and he does do so, if they turn out to be false, is as much guilty of a fraud as if when he made them he had known them to be false: *Sharp v. Mayor*, 25 How. Pr. R., 389, 40 Barb., 256; *Marsh v. Falkner*, 40 N. Y., 562, 572; *Bigelow on Fraud*, 60-64; *Cooley on Torts*, 500.

The elements of fraud, thus defined, are:

1. The person making the misrepresentation must assume to have knowledge of such material fact, or he must intentionally convey to the person defrauded the impression that he has actual knowledge thereof.

2. He must be conscious that he has no such knowledge.

3. He must make a material misrepresentation of such fact as of his own knowledge, in such a manner as to import knowledge in him thereof.

4. Such misrepresentation must be made to another with the intent that he should rely on it, and he must have done so. All these facts may be shown by the transaction itself, and the circumstances surrounding it.

5. Such representation must have turned out to be false.

The following cases sustain the exception above formulated:

Arkansas: *Goodwin v. Robinson*, 30 Ark., 585.

But see *Righter v. Roller*, 31 Ark., 170.

Canada, Upper: See *Young v. Pickers*, 28 U. C. Q. B., 385; *McLean v. Buffalo, etc.*, 28 U. C. Q. B., 448.

English: *Taylor v. Ashton*, 11 Mees. & Welsb., 400.

Illinois: *Case v. Ayres*, 65 Ills., 142.

See *Bond v. Ramsey*, 89 Ills., 29.

Indiana: *Woodruff v. Garver*, 27 Ind., 4; *Hammons v. Espy*, 1 Wilson's Superior Ct. R., 536; *Frenzel v. Miller*, 37 Ind., 2.

Iowa: *McKown v. Furguson*, 46 Iowa, 636.

Kentucky: *Foard v. McCorrib*, 13 Bush, 723.

Massachusetts: *Litchfield v. Hutch-*

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inson, 117 Mass., 195; Fisher v. Mel-
len, 103 Mass., 503.

Michigan: Webster v. Bailey, 31
Mich., 36; Beebe v. Knapp, 28 Mich.,
55; Stone v. Covell, 29 Mich., 359.

See Bristol v. Braidwood, 28 Mich.,
191.

Missouri: Pomeroy v. Benton, 57
Mo., 531; Dunn v. White, 63 Mo., 181;
Brownlee v. Hewett, 1 Mo. App., 360.

New York: Bennett v. Judson, 21
N. Y., 238; Indianapolis, etc., v. Tyng,
4 Thompson & Cooke, 524, 2 Hun,
311, 63 N. Y., 653; Sharp v. Mayor,
25 How. Pr., 889, 40 Barb., 256;
Wakeman v. Dalley, 51 N. Y., 27;
Mead v. Bunn, 32 N. Y., 275; Marsh
v. Falkner, 40 N. Y., 562, 575; Bishop
v. Davis, 9 Hun, 842; Craig v. Ward,
36 Barb., 378, 3 Keyes, 387; More-
house v. Yeager, 41 N. Y. Superior Ct.
R., 135.

Ohio: Ætna Ins. Co. v. Reed, 33
Ohio St. R., 283; Parmlee v. Adolph,
28 Ohio St. R., 10; Nugent v. Cincin-
nati, etc., 2 Disney, 302.

Pennsylvania: Bower v. Fenn, 11
Lancaster Bar, 117; Fisher v. Worrall,
5 W. & S., 478; West v. Grant, 71
Penn., 95; Watts v. Cummins, 59
Penn., 84.

West Virginia: Dickinson v. Rail-
road Co., 7 West Va., 392.

Wisconsin: Cotshausen v. Simon,
1 N. W. Reporter, N.S., 473 bottom
paging, 305 Wisconsin paging; Bird
v. Klimer, 41 Wisc., 134.

One who, with knowledge of a fraud-
ulent combination to obtain the prop-
erty of another without paying there-
for, becomes a party thereto and aids
in the accomplishment of the fraudu-
lent purpose by making representa-
tions which he knows, or has reason
to believe false, is liable for the dam-
ages sustained by the owner: More-
house v. Yeager, 71 N. Y., 594; Stitt
v. Little, 63 N. Y., 427; Witmark v.
Herman, 44 N. Y. Superior Ct. R., 144.

It has been held that the principle
laid down in Bennett v. Judson, 21
N. Y., 238, and Craig v. Ward, 36
Barb., 377, that a party making a rep-
resentation false in fact renders him-
self liable, in an action for fraud,
although he did not actually know the
representation to be false at the time,
does not apply to cases of fraud and
deceit in the sale of personal property.

Hence in an action to recover dam-
ages for false representations made by
a purchaser of personal property, as to
the value of a note of a third person,
transferred to the vendor in part pay-
ment of the price, the plaintiff is bound
to prove that the defendant actually
knew of the falsity of the representa-
tions made by him: Barrett v. Western,
66 Barb., 205.

We do not, however, see any princi-
ple upon which a distinction between
a fraud relative to real, and one rela-
tive to personal, property can be based.

[7 Chancery Division, 48.]

Fry, J., Nov. 10, 1877.

*NICHOLSON V. DRURY BUILDINGS ESTATE
COMPANY.

[48

[1876 N. 105.]

*Husband and Wife—Desertion of Wife—Protection Order—Property acquired after
Desertion—20 & 21 Vict. c. 85, ss. 21, 25—21 & 22 Vict. c. 108, s. 8—Wife's Chose
in Action—Reduction into Possession by Husband—Transfer of Shares into Joint
Names.*

A married woman became in 1866 entitled, on the death of an intestate, to a share
of his estate. Part of her share was paid by the administrator to the husband, and
in 1867 some shares in a joint stock company, which had been appropriated by the
administrator in respect of the remainder of the wife's share, were, with the assent
of the husband and wife, transferred into their joint names. In May, 1874, the
husband deserted the wife, and in November, 1874, she obtained from the justices a
protection order, by which her property and earnings acquired since the date of the

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desertion were protected from her husband. In 1876 the company resolved upon a voluntary liquidation, and the liquidator gave notice to the husband and wife that he was prepared to refund £900 in respect of the capital of the shares. The wife thereupon (suing as a *feme sole* under the protection order) commenced an action against the company and the husband, claiming payment of the £900 to her as a *feme sole*. The money was paid into court:

Held, that the transfer into the joint names did not amount to a reduction into possession by the husband, and that the wife was entitled to the £900 as a *feme sole* under the protection order, as being property acquired by her after the desertion.

THIS was an action by a married woman, suing as a *feme sole* under a protection order, against the above-named company and her husband Thomas Nicholson.

The plaintiff married Thomas Nicholson on the 16th of November, 1861. She was a niece and one of the next of kin of William Furness, who died intestate on the 26th of March, 1866. A part of her share in the estate was received by her husband, and with the assent of herself and her husband, twelve shares in the defendant company, which formed part of the estate, were, on the 30th of April, 1867, transferred by the administrator into the joint names of the husband and wife.

The 6th paragraph of the statement of claim contained the following allegations:—

“The defendant Thomas Nicholson received a sum of 49] money *which exceeded £1,000 from the administrator of the estate and effects of the said William Furness, on account of the plaintiff's distributive share of her personal estate, and the said administrator appropriated, as further part of the plaintiff's share of the estate of the said William Furness, certain shares or securities in railway and other public companies, and in consideration of the payment of the said sum of £1,000 to the defendant Thomas Nicholson, it was arranged and agreed between the said administrator and the plaintiff and the defendant Thomas Nicholson (amongst other things) that twelve shares of £100 each in the Drury Buildings Estate Company, and £300 consolidated stock of the Whitehaven and Furness Junction Railway Company, respectively forming part of the plaintiff's said share of the personal estate of the said William Furness, should be transferred by the said administrator into the joint names of the plaintiff and the defendant Thomas Nicholson, to the intent that the said shares and stock should not be sold or dealt with by either of them without the consent and concurrence of the other, and should, upon the death of either, become the absolute property of the survivor; and the certificates of the said shares and stock were, with the consent of the defendant Thomas Nicholson,

delivered to the plaintiff by the said administrator, and they have ever since remained and are now in her possession; and in consideration of such arrangement and agreement the plaintiff agreed to waive her equity to a settlement of her said distributive share of the personal estate of the said William Furness."

On the 16th of May, 1874, Thomas Nicholson deserted the plaintiff, and on the 6th of November, 1874, she obtained from the justices in petty sessions a protection order under sect. 21 of the act 20 & 21 Vict. c. 85.

By this order the justices ordered "that the earnings and property of the said Eleanor Ann Nicholson acquired or to be acquired since the commencement of such desertion as aforesaid (which desertion we find first commenced on the 16th of May, 1874), shall hereafter be protected from the said Thomas Nicholson her husband, and from all creditors and persons claiming, or who may hereafter claim under him: and that all such earnings and property shall *be- [50 long and shall be deemed to belong to the said E. A. Nicholson as if she were a *feme sole*."

From the date of that order the plaintiff continued to live separate from her husband. Before the action was commenced the Drury Buildings Estate Company had resolved upon a voluntary liquidation, and on the 7th of November, 1876, the plaintiff received notice from the liquidator that he was prepared to make a first return of £75 per share on the shares of the company, and that on the 9th of November a check for the amount payable in respect of the shares standing in the joint names of the plaintiff and her husband might be received. A similar notice was sent to the husband. On the 22d of November, 1876, the writ in the action was issued, and on the 1st of December the plaintiff moved before the Master of the Rolls for an injunction to restrain the liquidator from paying and the defendant Nicholson from receiving the £900 payable in respect of the twelve shares. On the hearing of the motion the Master of the Rolls ordered that the liquidator should pay into court, to the credit of the action, the sum of £892 (being the residue of the £900, and £12, a dividend due on the shares, after deducting £20 for the liquidator's costs), and that all further proceedings in the action should be stayed as against the liquidator, except for the purpose of enforcing the order, and that the further hearing of the motion should stand over until the trial of the action.

The statement of claim was delivered on the 2d of Jan-

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uary, 1877, and by it the plaintiff claimed a declaration that she was entitled as a *feme sole* to the £892 in court, and to any other sum payable in respect of the twelve shares, or to have the same settled on herself and her children, and an injunction against the defendant Nicholson.

North, Q.C., and *Speed*, for the plaintiff: The plaintiff is not bound by the alleged agreement for transfer into the joint names, for she was not competent to enter into such an agreement. There was no reduction into possession of the shares by the husband; the very object of the transfer was to prevent his reducing them into possession: *Prole v. 511 Soady* (*). *The money now payable in respect of the shares has, therefore, been acquired by the plaintiff since the date of the desertion, and is within the protection order. Sects. 21 and 25 (*) of the act of 20 & 21 Vict. c. 85, show what the effect of the protection order is. The wife is in the same position as if she had obtained a decree of judicial separation, and has the same rights with regard to property as if she were a *feme sole*. The word "acquired" in the protection order extends to property devolving upon or coming to her. This is shown by the latter part of sect. 21, and by sect. 25. The order to be obtained must be the order which the wife is entitled to apply for. That this is the proper construction of the section is shown by *Johnson v.*

(1) Law Rep., 8 Ch., 220.

(2) Sect. 21 provides that "A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband, and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. . . . If any such order of protection be made, the wife shall during the continuance

thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation."

By sect. 25, "In every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole*, with respect to property of every description which she may acquire or which may come to or devolve upon her: and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

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Lander (¹); *In re Coward & Adam's Purchase* (²); *In re Insole* (³).

[FRY, J., referred to *Re Whittingham's Trust* (⁴).]

*By 21 & 22 Vict. c. 108, s. 8, it is provided that in [52 every case in which a wife shall have obtained an order to protect her earnings or property, or a decree for judicial separation, "property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree."

[FRY, J.: If property, which is in reversion at the date of the desertion, is to be deemed to be included in the protection order, how can a subsequent reduction with possession after the date of the order be an acquisition by the wife?]

The object is to benefit the wife, and to prevent the husband from reducing the fund into possession after the date of the order. The second act shows that the first was intended to extend to property to which the wife was entitled at the date of the desertion, but which she had not actually received, and that is the principle of the decisions.

Cookson, Q.C., and *Badcock*, for the husband: The arrangement made between the husband and wife for the transfer of the shares into their joint names amounted to a settlement. If it was not originally binding upon her, she has by her statement of claim adopted and ratified it, she treats it as valuable consideration for her waiving her equity to a settlement, and she could not now claim any such equity.

[FRY, J.: You must show a deliberate intention in the pleadings to ratify the agreement. I must look at the whole of the statement of claim.]

If there was not a settlement, at any rate the transfer of the shares into the joint names could only have been made by the direction of the husband; it amounts, therefore, to a reduction into possession by him. Any exercise of ownership by the husband over property coming to him *jure mariti* binds the wife.

[FRY, J.: Suppose he had put the shares into the wife's sole name, would that have been a reduction into possession by him?]

Yes. The wife's direction to the administrator was worth

(¹) Law Rep., 7 Eq., 228.

(²) Law Rep., 1 Eq., 470.

(³) Law Rep., 20 Eq., 179; 18 Eng. R., 712.

(⁴) 12 W. R., 775.

53] *nothing. She had no right to the property unless she came to the court to enforce her equity to a settlement. The administrator could have obtained a complete discharge by transferring the shares to the husband.

If the wife had died before the transfer into the joint names, the husband would have taken the whole fund as survivor, but he must have taken out administration to the wife. Now, however, if the wife died, he would take the fund simply as survivor, and would not have to take out administration to her. The title of both husband and wife was entirely altered by the transfer, and that amounts to saying that the husband has reduced the fund into possession. The husband, who was the only person entitled to the shares, but for the wife's equity to a settlement, which she took no steps to assert, said to the trustee, Transfer the shares into our joint names. The effect is the same as if the shares had been transferred to the husband, and he had then transferred them into their joint names. The wife's original title is gone, and she is entitled simply as a *cestui que trust* under the settlement made by the husband.

As to the effect of the protection order, the Master of the Rolls in *In re Coward & Adam's Purchase* (1), proceeded upon the words "come to, or devolve upon," in sect. 25 of the act, and did not mean to decide that property vested in the wife in possession, but not actually received by her or her husband before the date of the desertion, was, when afterwards converted into money, property "acquired" by her during the desertion. In that case the money had actually "come to" her by payment after the protection order, and it was held that her receipt was a good discharge to the person who had made the payment.

FRY, J.: In my opinion the plaintiff is entitled to the relief which she asks. The first question is, whether the moneys now payable by the liquidator in respect of the shares which stood in the joint names of the plaintiff and her husband are or are not property which, within the meaning of the protection order, has been acquired by the wife since the 16th of May, 1874. I am of opinion that 54] *the money was acquired by her when the shares were realized in the winding-up. I think that the position of things is the same as if the shares had remained in the name of the intestate, but appropriated by the administrator to the plaintiff as one of the next of kin, and the money arising from the realization of the shares had been paid to her by the administrator. If I am right in that view, the case is covered

(1) Law Rep., 20 Eq., 179; 13 Eng. R., 712.

by the decision of the Master of the Rolls in *In re Coward & Adam's Purchase* ('). In that case a married woman, who was entitled to a legacy charged on real estate, which had not been reduced into possession by her husband, obtained a protection order in consequence of her husband's desertion, and the Master of the Rolls held that her receipt was a good discharge for the legacy, which was paid to her by the owner of the estate after the date of the protection order. The Master of the Rolls said ('): "Here the person liable to pay the legacy goes to the wife after the protection order and offers to pay it. He might have paid it to the husband, but, having thus come to the wife and offered to pay it to her, it comes to her within the meaning of the section, and that which never was hers before becomes hers when she is to be considered with respect to it as if she were a *feme sole*. Both on the words of the section, and on the true meaning of the transaction, this is property which she acquires after the date of the protection order." I think, by parity of reasoning, that, although the present right to the shares had vested in the plaintiff before the desertion, yet, as the shares were not realized till after the desertion, the money arising from the realization is property acquired by her since the commencement of the desertion, and is therefore covered by the protection order.

But it is said that there are two grounds upon which I ought not to come to this conclusion. First, it is said that the plaintiff herself has alleged in her statement of claim that the transfer of the shares into the joint names was made in consequence of the previous arrangement which is mentioned in paragraph 6. [His Lordship read the paragraph.] It is contended that that arrangement or agreement amounted to a settlement upon the plaintiff. It is admitted that, independently of the pleadings, such a *settlement [55 would not be binding upon her, but it is said that by alleging in her pleadings the actual existence of the agreement she has done two things: she has ratified the agreement, and has put herself out of court by that ratification. In other words, I am asked to hold that the plaintiff has fallen into a trap; that by stating as a fact that which actually happened she has precluded herself from obtaining that relief to obtain which the statement was made. I think the court would struggle to avoid such a conclusion as that. I shall not allow pleadings to be used for the purpose of showing that there has been an abandonment of those very

(') Law Rep., 20 Eq., 179; 13 Eng. R., 712.

(2) Law Rep., 20 Eq., 181; 13 Eng. R., 714.

rights which they were intended to enforce. If it were necessary I should allow the plaintiff to amend the statement of claim by inserting an allegation that she does not rely upon, but, on the contrary, repudiates, the agreement which was in fact made. I therefore hold that no settlement has been made which precludes the plaintiff from making her present claim.

Then, in the second place, it is said that, even if no settlement was made, the transfer of the shares into the joint names amounted to a reduction into possession by the husband. I invited the counsel for the defendant to give me a definition of reduction into possession. With great prudence and propriety they declined to do this. I intend to imitate their prudence, and not to attempt giving any definition beyond saying this, that, so far as I am aware, nothing has ever been held to amount to reduction into possession of a wife's *chose in action* which does not give the husband for some moment of time absolute dominion over the property without any concurrence of the wife. No authority contrary to this view has been produced, and I believe that none can be produced. If that be so, the question is, whether this fund has ever been for a single moment under the absolute control of the husband? It appears to me that it has not. The shares never passed into his name, and he never had the absolute control of them. I may refer to the definition given by Mr. Spence⁽¹⁾. He says, "Reduction into possession as regards *choses in action* means actual payment to the husband in his character as husband, not as trustee, or what is equivalent to it; if the property has been paid to *his* agent, or so dealt with that the property is no longer a *chose in action* of the wife, but under the exclusive control of the husband, or has been in the exercise of his exclusive control placed by him in the hands of or transferred to other persons upon some trust inconsistent with the existence of the wife's possible title by survivorship, that will be considered as a reduction into possession. In case a married woman be entitled to a *chose in action*, whether legal or equitable, the mere circumstance of the legal title being changed, without more, does not in general affect her." If that be so, it follows, in my opinion, that there has been in this case no reduction into possession by the husband, inasmuch as the transfer into the joint names was not inconsistent with the wife's title by survivorship. But it is said that the wife's original title was gone by reason of the transfer, and that a fresh title has accrued

(1) 2 Sp. Eq. Jur., p. 478.

to her. I do not think that that argument ought to prevail. I shall therefore direct the sum in court to be paid to the plaintiff, and I shall declare that she is entitled to any further sums which may become payable in respect of the shares. The defendant Nicholson must pay the costs of the action.

Solicitors for plaintiff: *Nicol, Son & Jones*, agents for C. G. Thomson & Wilson, Kendal.

Solicitors for defendant: *Vizard, Crowder & Co.*, agents for Lynch & Teebay, Liverpool.

[7 Chancery Division, 58.]

Fry, J., Nov. 17, 1877.

*WOLLASTON V. WOLLASTON.

[58

[1876 W. 244.]

Administration Action—Annuitant.

The legatee of an annuity charged upon residue is entitled to have judgment for administration of the estate.

EDWARD L. WOLLASTON by his will bequeathed to his wife, Mary Wollaston, his shares in the Thames Tunnel, and an annuity of £500 a year, such annuity to be a charge upon his freehold farms in the parish of Staple, and upon the other residue of his estate; and he devised the farms and the residue of his estate, real and personal, to Alexander L. Wollaston. The testator died in December, 1866, and his will was proved by Alexander L. Wollaston and Frederick L. Wollaston, the executors. Alexander L. Wollaston died in 1874, having appointed by his will Susannah C. Wollaston, Frederick L. Wollaston, George H. Wollaston, and F. Sandeman, his executors.

The testator had had seventy-seven Thames Tunnel shares, which had been altered to shares in the East London Railway Company, and the plaintiff, Mary Wollaston, had in the lifetime of Alexander L. Wollaston claimed these shares, Alexander L. Wollaston claiming them under another bequest in the will. This action was brought by her against Frederick L. Wollaston and the other executors of the will of Alexander L. Wollaston, claiming that the estate of Edward L. Wollaston might be administered under the court; that it might be declared that the plaintiff was entitled to the East London Railway shares; and that all necessary accounts might be taken and inquiries made and directions

given for the purpose of securing the payment of the annuity of £500 a year to the plaintiff.

The first question argued on the trial of the action was as to the shares; on which the court decided, against the plaintiff, that the defendants representing the estate of Alexander L. Wollaston took these shares under the will of Edward L. Wollaston.

59] *The plaintiff then asked for judgment for an ordinary administration of the estate of Edward L. Wollaston.

North, Q.C., and *Millar*, for the plaintiff.

Cookson, Q.C., and *C. W. Chute*, for the defendants, contended that an annuitant was not as of course entitled to an administration decree, especially when the annuity was charged on land on which the annuitant could distrain: *Sollory v. Leaver* (¹), *Kelsey v. Kelsey* (²), *Burrell v. Delevante* (³), and *Norman v. Johnson* (⁴).

Fry, J.: The statement of claim raises two questions. The first, relating to the shares, has been already decided against the plaintiff. The second question is whether the plaintiff, as an annuitant, is entitled to judgment for administration. Mr. Cookson has argued, first, that the plaintiff, as an annuitant, is not entitled to have judgment for administration; but in my opinion the charge of an annuity on the residue gives the annuitant a most important interest in the residue, and she is entitled to know the amount of the residue, so as to know the extent of the property out of which her annuity is payable. In my opinion a person who has a charge upon a residuary estate has a right to have the amount and nature of that estate ascertained, otherwise she would have but an idle benefit conferred on her. Mr. Cookson has not been able to produce any authority in point, and I therefore determine, upon principle, that the plaintiff, as an annuitant, is entitled to a judgment for administration.

Solicitor for plaintiff: *W. H. Tattam*.

Solicitors for defendants: *J. & R. Gole*, agents for *Hickman & Son*, Southampton.

(¹) Law Rep., 9 Eq., 22.

(²) 30 Beav., 550.

(³) Law Rep., 17 Eq., 495.

(⁴) 29 Beav., 77.

[7 Chancery Division, 60.]

Fry, J., Nov. 19, 1877.

*KRONHEIM V. JOHNSON.

[60]

[1877 K. 80.]

Statute of Frauds, s. 7—Declaration of Trust of Land—Writing—Signature—"Party by Law enabled to declare Trust"—Legal and Beneficial Owner—Unsigned Postscript to Signed Letter on separate Paper.

When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of sect. 7 of the Statute of Frauds, is the beneficial owner only.

Tierney v. Wood ⁽¹⁾ followed.

The absolute beneficial owner of land vested in a trustee wrote a letter to the mother of her infant grandson. The letter was signed with the writer's initials. Inclosed in the same envelope, but on a separate piece of paper, was another document in the handwriting of the same person, and headed "Supplement." This document was not signed in any way. It commenced thus: "I had quite omitted to tell you," but it contained no other reference to the letter, and the letter in no way referred to it. It was alleged that the "supplement" contained a declaration of trust of the land in favor of the infant:

Held, that the "supplement" was not signed so as to satisfy the statute.

THE plaintiff in this action was a married woman suing by a next friend.

By her statement of claim she alleged that in the latter part of the year 1876, she being then living apart from her husband, arranged with the defendant James Isaac Johnson (who was the father of the wife of her son Martin Kronheim) that he should take in his own name the lease of a house called Stapleford Villa, and that she should pay towards the purchase-money, which was to be £700, the sum of £250, and that the residue of the purchase-money should be obtained from a building society by a mortgage. At the same time it was arranged between the plaintiff and Johnson that he should procure a deed of settlement to be prepared, whereby the leasehold premises so to be purchased by him should be settled, upon trust, in the first place, to pay the rents and profits to the plaintiff during her life, and after her death, in case the defendant James Judson Kronheim, an infant (the son of the plaintiff's son *Martin Kronheim), should then have attained twenty- [61] one, upon trust for him absolutely, but, in case he should not survive the plaintiff, or surviving her should die under twenty-one without lawful issue, then upon trust for Martin Kronheim absolutely. The plaintiff accordingly paid £250 out of her own moneys to Johnson, and he obtained a lease of the house to be granted to him for £700, of which

(¹) 19 Beav., 330.

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Fry, J.

the residue of £450 was raised by a mortgage of the house to a building society. The plaintiff had, out of her own moneys, since paid the instalments in respect of the mortgage to the society as they fell due. On the 1st of January, 1877, Johnson executed a deed of settlement of the house by which, after reciting the lease and the mortgage, and that he was desirous of making some provision for his grandson J. J. Kronheim, he assigned the house to himself and the defendant George Moxon, upon trust to apply the net income in and towards the maintenance, education, and advancement in life of J. J. Kronheim during his minority, and, when and so soon as he should have attained twenty-one, to assign the premises to him absolutely. And, in case he should die under twenty-one, then, from and immediately after his death, the trust premises should revert to and form part of the personal estate of Johnson. The plaintiff did not see the deed before it was executed, and did not obtain a copy of it till the 19th of February, 1877. She then objected to it as not being in accordance with the arrangement come to between her and Johnson, and on the 14th of April, 1877, she commenced this action, by which she claimed a declaration that the deed was void, and asked that it might be ordered to be delivered up to be cancelled; that Johnson and Moxon might be ordered to assign the premises to her, or as she might direct, and that Johnson might pay the costs of the action. The plaintiff's husband and the infant were defendants to the action.

The defendants Johnson and Moxon, by their statement of defence, said that, in order to avoid any difficulty which might be occasioned by the plaintiff being a married woman, and any question about the rights of her husband in the matter, she requested Johnson to carry out her arrangement about the house in his own name, and to make the settlement of the house in favor of the infant as if the property [62] were that of Johnson *himself. Accordingly the property was leased to him, and he entered into various covenants of an onerous nature, including the covenant to pay the rent, and he also, on mortgaging the property to the building society, covenanted with them to pay the mortgage money and interest, and to observe the regulations of the society. After the lease had been granted, and the mortgage effected, Johnson desired his solicitors to settle the property, subject to the mortgage, in favor of the infant defendant, and he did not instruct them to insert any trust in his own favor, but he gave them to understand when they prepared the settlement that the property belonged to him,

and they inserted the ultimate trust in his favor in the belief that the property ought to revert to him as the settlor, and without his having given them any instructions to insert such a trust. He believed when he gave instructions for the preparation of the deed that the plaintiff had informed him that her desire was that the settlement should be made in favor of the infant defendant, and that she did not desire that it should contain any trust in her own favor or in favor of the infant's father.

On the 9th of December, 1876, the plaintiff wrote a letter to the wife of her son Martin Kronheim (the daughter of the defendant Johnson). Inclosed in the same envelope with this letter, but on a separate sheet of paper, was a postscript written by the plaintiff. This document was headed "Supplement," and was, so far as material, as follows:—

"I had quite omitted to tell you and Martin that the title-deed for Stapleford Villa has been made out in Gampey's name as if he were the purchaser, and it is currently reported and received as a fact that he has bought the house for his little grandson Jimmy. So you and Martin must bear this stratagem in mind, and when you speak of or are spoken to about the house, remember it is Gampey's gift to little Jimmy. Even Fanny Whitehorne has learned to consider it as such, so mind this if you ever meet her. Gampey is to settle it on Jimmy through a deed of trust, as he calls it, which deed he tells me is in process of being made out or drawn up, as it is technically termed. The building society, through whom the house has been bought, have advanced for it £450. I have paid in all into Gampey's hands £271, making in *all £722, including £1 interest on the £20 [63 which was paid for it and as a deposit on the purchase of the house. I have to pay the building society in monthly instalments of £4. I have already paid one month's instalment, and got the company's book with their receipt in it for the same. Thus I have paid down for Stapleford Villa £275. I give these details for Martin's information, as I thought he would like to know how the matter had been accomplished in a financial point of view, and I hope it will meet with his approval."

The letter was signed with the plaintiff's initials, but the "Supplement" was not signed in any way.

The defendant Johnson was the person referred to as "Gampey," and the infant defendant was the person referred to as "little Jimmy."

The defendant Johnson submitted that he was entitled to be paid by the plaintiff certain expenses which he had in-

curred in relation to the lease and the mortgage, and to be indemnified by her, and out of the leasehold premises, against the obligations and liabilities which he had incurred in respect of the leasehold property, and the lease and mortgage thereof.

This was the trial of the action. The facts appearing in the statement of claim were substantially admitted, and no evidence was adduced on either side.

Kekewich, Q.C., and *G. Murray*, for the plaintiff: It is admitted that the plaintiff was the beneficial owner of the property. No effectual trust has been declared so as to satisfy sect. 7 (1) of the Statute of Frauds. The beneficial owner is "the party who is by law enabled to declare" the trust: *Tierney v. Wood* (1). The trustee, who is owner of the legal estate, cannot do it.

The postscript may, perhaps, be relied on as a declaration of trust by the plaintiff in favor of the infant. But, even if 64] it is *signed so as to satisfy the Statute of Frauds, it amounts to nothing more than an expression of intention.

[They were stopped by the court.]

North, Q.C., and *Langworthy*, for the defendants Johnson and Moxon, and for the infant grandson: The plaintiff's object was to benefit the infant, and she wished to have the transaction kept a secret. For this reason, when Johnson instructed his solicitor to prepare the settlement, he professed to act as the absolute owner of the property, and said nothing about the plaintiff's interest. This was the natural result of her wishing it to be kept secret; and the form of the settlement would have been quite proper if Johnson had been the real owner of the property. The mistake arose naturally from the plaintiff's own wish, and Johnson ought not to be saddled with the costs of the action. He ought to be paid his costs, charges, and expenses as trustee, and to be indemnified by the plaintiff against the lessee's and mortgagor's covenants. The settlement ought, at the most, to be rectified.

[FRY, J.: Can a voluntary settlement be good in part? If it does not carry out the intention of the settlor, must it not be set aside *in toto*? *Turner v. Collins* (2).]

On behalf of the infant we say that a complete trust for him has been declared.

(1) 29 Car. 2, cap. 3, sec. 7: "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust,

or by his last will in writing, or else they shall be utterly void and of none effect."

(2) 19 Beav., 330.

(3) Law Rep., 7 Ch., 329, 342; 2 Eng. R., 290, 303.

[FRY, J.: Is the declaration of trust valid within sect. 7 of the Statute of Frauds?]

The statute does not apply, for the settlement was a matter of bargain between the plaintiff and Johnson. She found the money; he took on himself the burden of the covenants in the lease and in the mortgage, and so gave consideration for the settlement which was made. He and the plaintiff were engaged in a common purpose, and if no settlement had been made she would not have been entitled to say "The lease is mine, assign it to me."

But, if the statute does apply, the meaning of sect. 7 is that either the legal or the equitable owner may sign the declaration of trust. *Tierney v. Wood* (*) is only a decision that the signature *of the equitable owner is sufficient; [65 it does not decide that the signature of the legal owner would not do, though, no doubt, the judgment contains *dicta* to that effect.

But, if the plaintiff is the only person who can declare a trust, she has done so effectually by the postscript to the letter. The language amounts to a declaration of trust in favor of the infant. The postscript is sufficiently signed by the plaintiff, inasmuch as it was sent with the letter which was signed by her.

Kekewich, in reply: There is nothing to indicate that the signature to the letter was intended to apply to the postscript; there is no sufficient connection between the two documents: *Caton v. Caton* (*). There Lord Chelmsford said (*) that the cases "establish that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of 'authenticating the instrument,' or 'so as to govern the whole agreement,' to use the words of Sir William Grant in *Ogilvie v. Foljambe*" (*). Johnson ought to pay the costs of the action, for the difficulty has arisen from his not instructing his solicitor properly. He ought to have disclosed the plaintiff's interest in the property.

FRY, J.: The plaintiff has brought this action to obtain an assignment from the defendants Johnson and Moxon of a leasehold house, which is held under a lease granted to the defendant Johnson. The house is subject to a mortgage for £450 created by Johnson, and it appears that on the 1st of January, 1877, Johnson executed a settlement by which

(1) 19 Beav., 330.

(2) Law Rep., 2 H. L., 127.

(3) Law Rep., 2 H. L., 139.

(4) 3 Mer., 53.

he assigned the house to himself and Moxon as trustees upon certain trusts for the benefit of the infant defendant, with an ultimate trust in Johnson's own favor. The plaintiff's case is that she was the real owner of this house; that it was at her request that Johnson took the lease; that she paid £250 towards the purchase-money, the rest of it being [66] raised by* the mortgage; that in making the purchase Johnson was acting on her behalf; that she intended the property to be settled upon trusts which she communicated to him, and that in making the settlement which he did actually make he fell into a blunder. Further, it is contended on her behalf that under sect. 7 of the Statute of Frauds a valid declaration of trust of land can only be made when it is proved by a writing signed by the person who is by law enabled to declare the trust, and it is said that the plaintiff, being the beneficial owner of the house, was the only person who was by law enabled to declare a trust of it, and that, as she never did so, no valid trust has been declared. I accede to the proposition that the plaintiff was the person by law enabled to declare the trust. I am of opinion that *Tierney v. Wood* (*) amounts to a decision that the beneficial owner is the person who is by law enabled to declare the trust. Lord Romilly there says (*), "That the person to create the trust, and the person who is, by law, enabled to declare the trust, are one and the same; and that, consequently, the beneficial owner is the person by law enabled to declare the trust." I come, therefore, to the conclusion that the plaintiff was the person by law enabled to declare the trust, and that, unless she did so by some writing signed by her, no valid settlement of the property could be effected. It is said, however, that the settlement was made in pursuance of a bargain between the plaintiff and Johnson, by which he agreed to undertake the legal liabilities of the lease and the mortgage, upon the condition that if he did so the property should be settled upon the infant. Therefore it is said that Johnson gave valuable consideration for the settlement, and that his declaration of trust alone was sufficient. I cannot accede to this argument. It amounts to this, that Johnson must be taken to have been a co-owner of the house with the plaintiff, and the proposition that one of two persons, who are by contract jointly interested in land, can declare a trust of it, binding the whole beneficial interest, without the concurrence of the other co-owner, is not, I think, tenable. Then it is further said that the plaintiff herself has made a valid declaration of trust of the house,

(*) 19 Beav. 330.

(*) 19 Beav., 336.

and in support of this contention reliance is placed upon a postscript or "supplement" to a letter which, it is admitted, *was written by the plaintiff to her daughter- [67 in-law, the mother of the infant. That postscript, it is said, contains a statement that the house is the property of the infant. It appears to have been sent in the same envelope with the letter, though it was written upon a separate sheet of paper. The letter was signed with the plaintiff's initials. It does not contain, and could hardly have contained, any reference to the postscript. The postscript is not signed at all, and it contains no reference to the letter, except in the introductory words, "I had quite omitted to tell you and Martin." It is contended that the postscript is sufficiently signed within the meaning of the Statute of Frauds. In my opinion it is not. I think that, as was said in *Caton v. Caton* (1), the signature ought to have been so placed as to show that it was intended to authenticate and refer to the declaration of trust in the postscript. For that purpose it is not necessary that it should be either at the beginning or at the end of the instrument, but it must be placed in such a position as to authenticate and refer to the material part of it. In my opinion the signature to the letter does not satisfy this condition. There is no physical connection between the two documents, except that they are found in the same envelope, and there is no sufficient reference in the one to the other. I therefore hold that the postscript was not signed within the meaning of the Statute of Frauds. I should have been indisposed to hold that the language of the postscript amounts to a declaration of trust; it appears to me to be, not a statement of fact, but rather a suggestion of what is to be represented as a fact by the recipient. But I prefer to rest my judgment on the other ground.

There remains the question of costs. If the case had rested upon the Statute of Frauds alone, I should have felt some difficulty in giving the plaintiff her costs. But she has put her case upon what she says is an error in the settlement which has been made, inasmuch as no life estate is reserved to herself, and the ultimate remainder is reserved to Johnson himself. I cannot, however, overlook this fact, that it was the common design of the plaintiff and Johnson that the transaction should be represented as the settlement of the grandfather upon the infant. She desired him so to represent it, and she wished her interest in the matter to be *kept secret. The only certain way of keeping a secret [68 is not to tell it to anybody. He did not tell his solicitor

(1) *Law Rep.*, 2 H. L., 127.

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anything about the plaintiff's interest in the property, and this led to the blunder in the frame of the settlement. I cannot say that under the circumstances Johnson acted so unreasonably in not informing his solicitor of the real facts of the case that I ought to order him to pay the plaintiff's costs of the action. I must, therefore, declare that the plaintiff is entitled to the house free from any claim on the part of the infant. The plaintiff must indemnify Johnson against the lessee's and mortgagor's covenants, and must pay his costs, charges, and expenses properly incurred as trustee (other than the costs of the action), and he and Moxon must assign the lease to the plaintiff, subject to the mortgage. I give no costs of the action up to the trial.

Solicitors for plaintiff: *Weeks & Son.*

Solicitors for defendants: *Finney & Bruff.*

See 22 Eng. Rep., 392 note, and note to *Winn v. Bull*, ante, p. 382.

[7 Chancery Division, 70.]

C.J.B., Nov. 19, 1877.

70] **Ex parte ROY. In re SILENCE.*

Bankruptcy—Order and Disposition—Lien—Bankruptcy Act, 1869, s. 15, sub. 5.

A horse dealer supplied a customer with a pair of horses, for which she paid £170, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the £170, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses:

Held, that the horses were in the bankrupt's order and disposition; and that the customer could not enforce a lien on them as against the trustee in bankruptcy.

[7 Chancery Division, 75.]

V.C.M., July 8, 15, 1876: C.A., Nov. 7, 14, 1877.

75] **In re WEDGWOOD COAL AND IRON COMPANY.*

ANDERSON'S CASE.

Companies Act, 1867, s. 25—Paid-up Shares—Contract with the Promoters of the Company—Variation between Memorandum and Articles of Association.

A syndicate was formed for the purchase of a coal mine from A., with a view to forming a company to take the mine. The mine was accordingly agreed to be conveyed by A. to B. (who was to establish a company for taking over the mine) in consideration of £86,000, of which £42,000 were to be in paid-up shares of the intended company. The memorandum of association stated that the capital was to be £200,000 in 20,000 shares of £10 each. The articles of association stated that the mine belonged to the persons named in the schedule of an agreement to be executed

immediately after the registration of the articles, and that 15,000 paid-up shares were to be allotted to them in the proportions mentioned in the schedule. Soon afterwards B. declared himself a trustee for the company, and subsequently to this the agreement referred to in the articles was executed, and by it B. declared that he had entered into the agreement for the purchase of the mine on behalf of the persons named in the schedule (being A., the members of the syndicate and their nominees), and that they declared they held the mine in trust for the company; and that 15,000 paid-up shares were to be allotted to them in the proportions therein mentioned. This agreement was registered under the 25th section of the Companies Act, 1867. A., besides the shares representing the purchase-money of the mine, purchased 3,520 from one of the members of the syndicate, and other persons. The directors issued a large number of debentures on the security of the property of the company, but no other shares were issued except those 15,000 paid-up shares. The company being wound up:

Held (reversing the decision of Malins, V.C.), that the registered agreement was made *bona fide* and for good consideration, and was a sufficient contract in writing within the 25th section of the Companies Act, 1867; and that there was nothing in the circumstances to estop A. from claiming the shares which he had purchased, as paid-up shares.

Whether a memorandum in writing under which a person is to take paid-up shares without any consideration, is a contract within the 25th section of the Companies Act, 1867, *Quære*:

Held, also, that there was no inconsistency between the memorandum and articles of association in the fact that the memorandum stated the capital as consisting of 20,000 shares, and the articles stated that 15,000 of these shares were to be taken as paid up.

Crickmer's Case (1) distinguished.

THIS was an application to put Mr. Alexander Burnes Anderson on the list of contributories in the winding-up of the Wedgwood Coal and Iron Company for 3,520 shares of £10 each.

*The company was formed for the purpose, as stated [76 by the memorandum of association, of acquiring the interest of Mr. Anderson and a Mr. G. Baddeley, in the coal, ironstone, and other mines and minerals (other than fire-clay, fire-brick clay, and potter's clay), under certain lands known as Wedgwood Lane Ends and Brindley Ford, in the parishes of Woolstanton and Norton-in-the-Moors, Staffordshire.

On the 28th of March, 1872, Baddeley, who was then the lessee of the mines and minerals in question, in writing agreed with Anderson, in consideration of moneys paid at various times, to sell him one-half of his interest as lessee of the mines, and further, in the event of a company being formed with the assistance of Anderson, with a capital of not less than £40,000, he covenanted to sell and assign to Anderson on behalf of such company the other moiety of his interest in the mines for £7,500, and also, for another £7,500, certain plant and other effects which he had purchased from other persons, and Anderson agreed to abide by and carry out these terms, in case of the establishment of a company.

(1) Law Rep., 10 Ch., 614.

A syndicate was afterwards formed, Lieutenant-Colonel Innes and four other persons named Black, McDonald, Stafford, and Sheridan, for the purpose of purchasing the the mines from the owners and forming a company; and an agreement was entered into, dated the 19th of November, 1872, by which, after reciting that McDonald and Black had been authorized and empowered by the owners of the collieries to sell the same at a price fixed by the owners, and had associated with them Lieutenant-Colonel P. R. Innes and William Stafford for the said purpose, who had associated with them a Mr. Sheridan, and all parties had agreed to form themselves into a syndicate to purchase the property, and form a joint stock company for the purpose of raising the necessary capital, it was agreed that all the parties would continue their best efforts for the formation of the company and obtaining the capital, and that the net profits which should result therefrom, whether in cash, bonds, or shares, should be equally divided between them.

By another agreement, dated the 29th of November, 1872, it was agreed by P. R. Innes, Sheridan, and Stafford, that in consideration of the services of Black and McDonald, they 77] would, *upon the allotment of the bonds proposed to be issued, transfer to them fully paid-up shares to the extent of £12,500 each.

There was a further agreement, dated the 30th of November, 1872, and made between Anderson and Colonel Innes, by which Anderson agreed to sell to Innes the mines and minerals for £66,000, to be paid as to £24,000 in cash on completion, and £42,000 in fully paid-up shares in the company to be established by Innes, with a nominal capital of £200,000, for taking over and working the mines and minerals. The agreement also required that the company should be established within three months of its date, and that it should be deemed to be established when its capital in debentures actually paid up or subscribed for should amount to £50,000 at the least. It also provided for the appointment of Anderson to be manager, at a salary of £1,500 per annum.

On the 16th of December, 1872, the memorandum and articles of association of the company, which was called the Wedgwood Coal and Iron Company, were registered.

The memorandum of association was subscribed by seven persons for one share each, two of them being Colonel Innes and Charles Black, and the others being nominees of the other members of the syndicate. It stated the capital of

the company to be £200,000, divided into 20,000 shares of £10 each.

The articles of association contained the following clauses :

"5. In acquiring the leases, estates, mines, minerals, fixtures, plant, machinery, tools, buildings, and other properties, matters, and things, the immediate acquisition of which is specified in the memorandum of association as among the objects for which the company is established, the company shall confirm, and hereby does confirm and adopt, the agreement, dated the 30th of November, 1872, made between Alexander Burnes Anderson of the one part and Percival Robert Innes of the other part, and shall as speedily as possible after its incorporation obtain a complete legal assignment and transfer to itself of all the premises so to be immediately acquired.

"6. The said premises so to be immediately acquired belonged, and shall be considered to have belonged, to the persons whose names are stated in the schedule to an agreement executed immediately after the registration of these presents in the proportions *set opposite to their names [78 respectively, and in regard thereto the shares in the company's capital numbered 1 to 15,000, both inclusive, shall be considered as fully paid up, and shall be allotted to and taken by the said persons, or by persons to be nominated by them, in the proportions respectively mentioned in the said schedule.

"7. The board shall, as soon after the incorporation of the company as in their judgment is expedient, offer and issue to the public, mortgage debentures of the company to the amount of £75,000, in 3,000 debentures of £25 each, and for that purpose shall publish advertisements, and issue circulars, and take and do all such steps and things as in their judgment shall be necessary or expedient."

Article 8 provided that a trust deed should be executed making the debentures a first charge on the property of the company.

"12. The nominal capital of the company shall consist of £200,000, divided into 20,000 shares of £10 each, of which the first 15,000, amounting to £150,000, shall be first issued to the persons and in manner aforesaid."

Article 84 gave the names of the first directors, amongst whom were Anderson and Colonel Innes.

"88. In the management of the business of the company the directors may, subject to the restrictions hereinafter contained, without any further power or authority from the members, immediately on the incorporation of the com-

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pany, and notwithstanding that the nominal capital may have been only partially subscribed for, or that none but paid-up shares have been allotted, commence business, and do the following things in the name and on behalf of the company.

* * * * *

“(L.) They may without further authority or sanction of a general meeting or otherwise borrow in the name and on behalf of the company by way of mortgage a sum as aforesaid not exceeding £75,000 in debentures, payable to bearer of £25 each, or in any other denomination they may think proper, and at such rate of interest not exceeding £12 10s. per cent. as they may determine upon. The directors may also pay interest on all moneys paid in advance upon the 79] said debentures. They may from time to time, *by special resolution passed in general meeting, raise or borrow in the name or otherwise on behalf of the company such sums of money as they may from time to time think expedient by way of mortgage or by bonds, bills, notes, or in such other manner as they may deem best.”

The first board meeting took place on the 12th of December, 1872, at which directors were appointed, and the memorandum and articles of association adopted. There was another meeting on the 16th of December, at which the directors authorized the issue of debentures to the amount of £60,000, in 2,400 debentures of £25 each, bearing interest at 10 per cent., with coupons attached, the principal and interest being charged on the entire property of the undertaking, and provision being made for paying off the whole in seven years by annual drawings. It was also resolved to issue a prospectus offering the debentures to the public.

By an agreement dated the 13th of January, 1873, and made between Colonel Innes of the one part and the company of the other part, after reciting the agreement of the 30th of November, 1872, for the sale of the property to Innes for £66,000 payable as therein mentioned, and reciting that Innes, in agreeing to purchase the said property, was only acting as a trustee for and on behalf of the Wedgwood Coal and Iron Company, Limited, to the extent and in manner thereafter appearing, it was agreed that Innes should complete the purchase of the said property, and that after he should have the property duly assigned to him he would, as soon as practicable thereafter, assign the same, except the clays therein, to the said Wedgwood Coal and Iron Company, Limited, their successors and assigns, and would in the meantime hold the same in trust for the said company,

their successors and assigns, for their sole and absolute benefit.

By another agreement also dated the 13th of January, 1873, and made between the company of the one part, and Lord Suffield and others, as trustees, of the other part, after reciting the agreement of even date, and reciting that the company were desirous of issuing mortgage debentures under their articles of association, but were unable at present to secure the repayment thereof by a legal mortgage of the said property, owing to their not having acquired the legal estate thereof, it was agreed that the company should, *as soon as practicable after Innes had assigned the [80 said property to the company, execute a legal mortgage thereof in favor of the said trustees, in order to secure the repayment to the debenture holders of the advances made by them in accordance with the terms of the prospectus issued by the company, and that until such deed should be executed the said trustees should for the purposes aforesaid have a charge upon such property to the amount of the debentures which should from time to time be issued.

By another agreement, dated the 29th of January, 1873, and made between Colonel Innes, the other persons named in the schedule, and the company, after reciting the agreement of the 30th of November, 1872, and further reciting that Innes had entered into that agreement, not on his own behalf alone, but on behalf of the several persons, including himself, whose names were set forth in the first column of the schedule to the agreement of the 29th of January, 1873, now in statement, and who had mutually agreed to stand and be possessed of and interested in the premises comprised in the recited agreement in the proportions respectively set opposite their names respectively in the second column, and to work the mines and so forth in partnership together, and for that purpose to form a limited company, and reciting the incorporation of the company with a nominal capital of £200,000, divided into 20,000 shares of £10 each, of which the first issue, amounting to £150,000, were to be deemed to be paid up in full, and were to be divided among the several persons whose names were set forth in the first column of the schedule thereto in the proportions and in the amounts set opposite their names respectively in the third column of the schedule thereto, It was witnessed, and Innes declared that he had entered into the recited agreement on behalf of and as trustee for the scheduled parties in the proportions set opposite to their names in the second column of the schedule thereto, and that they declared that they were en-

titled to and would stand possessed of the benefit of the recited agreement, and the mines, upon trust for the company; and it was also agreed that the whole of the first issue of the shares of the company, to the amount of £150,000, which were numbered from 1 to 15,000 inclusive, should be allotted amongst and be held by the several persons parties thereto 81] of the second part in the respective *proportions set opposite to their respective names in the third column of the schedule, and should for all purposes be and be deemed to be fully paid up shares in the company, of which the entire nominal amount had been actually paid to the company.

In the schedule Anderson was entered as entitled to 4,200 shares as his proportionate amount, and the whole 15,000 shares were allotted proportionally amongst the persons named in the schedule, being, besides Anderson, the members of the syndicate and their nominees.

This agreement was registered on the 5th of February, 1873.

The prospectus which was issued in pursuance of the resolution of the board was headed, "Issue of £80,000 in 2,400 debentures of £25 each, bearing interest at £10 per cent. in half-yearly payments, secured on the whole property of the company, payable in seven years by annual drawings, with a bonus of 10 per cent. on redemption." It stated that "the present issue of debentures will enable the directors to further develop this well-known property; and a trust has been created by which the whole property and income of the company is assigned to trustees to secure the half-yearly payment of interest, the amount necessary to meet the annual drawings and the bonus; the shareholders of the company take dividends only after the above payments have been made." It then gave the names of the trustees, and the directors and officers of the company, and described the property, and stated the present and expected produce of the mines. It concluded as follows: "The contract for the purchase of the property, dated the 30th of November, 1872, and made between A. B. Anderson and P. R. Innes, together with the memorandum and articles of association and the deed securing the property to the trustees, together with maps, &c., can be seen at the offices of the solicitors of the company, No. 8 Old Jewry."

A considerable number of debentures were taken up by the public, and some were allotted to Anderson. He also purchased 1,250 shares from McDonald, and other shares from other allottees, his total holding amounting to 3,520 shares, in addition to the 4,200 allotted in respect of his interest in

the property acquired by the company. It was in respect of these 3,520 shares that it was now sought to put him on the list of contributories.

*The company was wound up voluntarily under a [82 resolution passed in August, 1875.

No shares were allotted except the 15,000 paid-up shares allotted under the agreements.

The case came on for hearing before Vice-Chancellor Malins on the 8th of July, 1876.

Glasse, Q.C., and Higgins, Q.C., for the liquidator: This case is in principle covered by *Crickmer's Case*(¹). That was an attempt to evade the 25th section of the Companies Act, 1867, by saying that it could be satisfied merely by inserting a clause in the articles of association of the company. Here it is attempted to defeat that section by interposing a contract which is altogether without *bona fides*. The object of the arrangement was to obtain capital by means of debentures without any real issue of shares. There was nothing to satisfy the statement in the memorandum of association as to the amount of the capital, and the whole intention of the transactions was to make the company give £150,000 for property which they were entitled to have for £66,000.

[MALINS, V.C.: I think it must be considered as established that where there is a variation between the memorandum and the articles of association of a company, the memorandum must prevail.]

In that view, the entire balance, after allowing for the £66,000, remains to be called up. The contract of the 29th of January, 1873, cannot be supported as a completed contract, and if so, there is nothing to prevent the full amount of the shares being called up. Sect. 25 of the Companies Act, 1867, only applies to *bona fide* contracts, and this contract was clearly not *bona fide*. In any case the contract could not be valid beyond £66,000, and Anderson would certainly be a contributory for the balance. The company were entitled to have the property conveyed to them for £66,000, because Innes was a trustee of it for them for that amount, having declared himself such by the agreement of the 13th of January, 1873.

This case does not really differ in principle from such as *Fothergill's Case*(²), and *Leeke's Case*(³). The 25th [83 section can only be satisfied by the acquisition of something of value in respect of which the shares are issued: *Spargo's*

(¹) Law Rep., 10 Ch., 614; 44 L. J. (Ch.), 595.

(²) Law Rep., 8 Ch., 270.

(³) Law Rep., 11 Eq., 100.

Case ('). It must appear that some consideration has been given for the particular shares to entitle them to be treated as fully paid up: *Carling's Case* (').

Cotton, Q.C., and *Whitehorne*, for Anderson: The shares for which Anderson is now sought to be put on the list of contributories were bought by him at the market price from persons who received them as fully paid-up shares, and he has also shown his *bona fides* by taking up a large amount of debentures. The intention was that the 4,200 shares should be the price of his interest in the property handed over to the company, and the remaining share capital should be disposed of amongst the persons who had been instrumental in working out the scheme, and that the working capital should be provided by debentures, which were to be the first charge on the undertaking. All this was clearly expressed in the articles of association.

With regard to the constitution of the company, there was the utmost possible *bona fides*. The memorandum and articles of association were registered at the same time, and every one took with notice that no shareholder was liable to pay anything upon his shares. The articles of association show this, and there is nothing morally wrong or inequitable in such an arrangement, provided that it is fully disclosed, as it was in this case. The shareholders are not considered as such, but simply as persons having an interest in any equity of redemption after payment of the debentures.

It is not disputed that, in order to make a valid contract within the 25th section of the Companies Act, 1867, there must be a contract in writing deposited with the Registrar of Joint Stock Companies, and registered before the issue of the shares dealt with thereby. That was decided in *Crickmer's Case* ('). The question here is whether there is such a valid contract. The agreed price for the mine was 84] £150,000. If the contract was good, it *could make no difference that the vendors' shares were the only shares, and the rest of the necessary capital was to be provided by issuing debentures. The contract cannot be defeated by allegations as to the insufficiency of the consideration. If valid at all, it is valid for the entire amount of the capital, *In re Baglan Hall Colliery Company* ('); and unless the shares were given, the property still belonged to Innes and his associates. Innes is in the position of an ordinary vendor, and the fact of his being afterwards connected with

(') Law Rep., 8 Ch., 407; 5 Eng. R., 626.

(*) Law Rep., 10 Ch., 614; 44 L. J.

(*) 1 Ch. D., 115; Law Rep., 20 Eq.,

(Ch.), 595.

580; 15 Eng. R., 676.

(*) Law Rep., 5 Ch., 346.

the company in no way invalidates the original contract: *Goner's Case* (*). If there were no contract except the articles of association, the shares would have to be taken with the full liability upon them, but this contract makes the shares fully paid shares. The articles of association must then be looked to, and they recognize the liability to pay not only the £66,000, but the entire amount of the share capital. The distinction between this and *Crickmer's Case* (†) is, that in that case there was no contract apart from the articles of association. *Fothergill's Case* (‡) was an attempt to allot fully paid-up shares in satisfaction of a liability incurred by signing the memorandum of association. *Spargo's Case* (§), on the other hand, decides that the purchase-money for property obtained by the company is an equivalent for the liability on shares. *Carling's Case* (¶) simply decides that shares issued as fully paid up cannot be turned into shares on which there is a liability. It is quite consistent with the policy of the Limited Liability Acts that there should be a limited liability, and at the same time an unrestricted right to participate in profits. The only thing required is that the entire truth should be told, and that has been done in this case. Sect. 25 of the act of 1867 only requires that some value should in all cases be given for the shares in pursuance of a contract in writing. It is not denied that valuable property was given up to the company, and the court will not assume that the debenture holders have lost their money. The only ground on which the liquidator can succeed is that of fraud, and if so, there must be some one misled. *The debenture holders here [85 knew all the facts, and did not advance their money on the faith of any liability existing on the shares, and so far from Anderson having gained anything by these transactions, it is clear on the evidence that he is a heavy loser.

J. Pearson, Q.C., and Nicoll, for the holders of a large number of debentures, as well as for shareholders and simple contract creditors, supported the same contention with a view to working out a scheme for the reconstruction of the company.

MALINS, V.C.: My views are very clear, and I shall not trouble the learned counsel to reply.

The question I have to decide is, whether Mr. Anderson shall be put on the list of contributories of the company for

(*) 1 Ch. D., 182.

(†) Law Rep., 8 Ch., 407; 5 Eng. R.,

(‡) Law Rep., 10 Ch., 614; 44 L. J. 628.
(Ch.), 595.

(§) 1 Ch. D., 115; Law Rep., 20 Eq.,
580; 15 Eng. R., 676.

(¶) Law Rep., 8 Ch., 270.

3,520 shares of £10 each, which represents £35,200, and would be a most serious liability if there had been any danger of his being called upon to pay the full amount; but I am very glad to find that there is very little probability of that, and that it may turn out that he will not only not have to pay anything, but may ultimately derive considerable profits from this undertaking. Mr. Anderson, in the month of March, 1872, acquired the colliery as to which this question arises from a Mr. Baddeley, at a price which, whether large or small, is, in the view I take, very unimportant. I have no doubt whatever, and I do not think Mr. Anderson would deny, that he bought it with a view and in the expectation of being able to form a company to work what I am perfectly satisfied at the time he believed to be a valuable property. He bought the colliery in March, 1872, which was the time of the great success in the coal and iron trades; it is only just to Mr. Anderson to say that he might well be satisfied in 1872 that he had made a valuable acquisition, which he was warranted in selling for a very much larger sum than he gave for it, and I therefore attribute no improper motives to him in entering into the contract of the 30th of November, 1872, to sell the property to the company, that is, to Colonel Innes, representing the company, for £24,000 in money and £42,000 in shares, making therefore 86] together £66,000. [His *Lordship then referred to this document in detail, and continued:]

On the face of that contract I take it to be perfectly clear that although Colonel Innes was not in express terms stated to be acting on behalf of the company, yet the contract was from beginning to end entered into on the formation of the company, and Colonel Innes was bound to transfer this property to the company on the £66,000 being paid, and his being released from any liability to pay that sum. This is the only contract referred to in the prospectus of the company. Therefore, upon those two circumstances alone, I should distinctly come to the conclusion that Colonel Innes entered into this contract as a trustee for the company, and was bound to hand this property over to the company for the sum which he agreed to give for it merely as their agent. About a fortnight afterwards the prospectus was issued and the company was formed, the memorandum of association and the articles of association being dated the 14th and the company registered on the 16th of December, 1872. Now the memorandum of association, which is the great document in all companies, states that the liability of the members is limited, the capital of the company is £200,000,

divided into 20,000 shares of £10 each. There is not a syllable as to any shares to be issued as fully paid up, and on the memorandum of association it must be taken that to every one of the shares the liability to pay £10 is attached. The law, I think also, is now perfectly and clearly settled, that if a person takes shares in a company he is liable to pay for them in money or money's worth. Mr. Anderson, therefore, was entitled to receive from the company £24,000 in money and 4,200 shares, for which he gave value, and to the extent of the 4,200 shares no objection whatever can be or has been made or attempted to be made to his receiving fully paid-up shares.

Now, the company having been thus registered on the 16th of December, 1872, in order to remove all possibility of doubt as to the position of Colonel Innes, the memorandum of agreement of the 13th of January, 1873, was entered into. [His Lordship read the recitals of that agreement, and continued:]

Then, without a single share having been subscribed for, the company proceed to issue the prospectus, asking for subscriptions *to debentures to the amount of £60,000 [87 upon property which only cost in the most favorable view £66,000. There was nothing in the world for the debenture holders to resort to but that property, while those who were associated in these transactions were bound to know that on a trading property it is never allowable or warrantable to borrow more than one half the value. I acquit them of any dishonest motives, but the course taken was incautious and unjustifiable, and even reprehensible. Now, I have to decide whether Mr. Anderson is a contributory in respect of the 3,520 shares for which he is sought to be put on the list. Against that claim it is said that these shares were issued as fully paid-up shares. I am at a loss to understand that argument. I have pointed out that the memorandum of association is totally silent on the subject of there being fully paid-up shares. Therefore it means that every share is liable to pay £10. [His Lordship then read the 25th section of the act of 1875, and continued:]

Mr. Anderson is admittedly the owner of 3,520 shares. He is, therefore, by the act of Parliament liable to pay £10 upon every one of them, unless it be otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies. In order to get rid of this difficulty, on the 29th of January, 1873, a most extraordinary document was executed. [His Lordship then referred at length to the agreement of that date, and continued:]

It is said that there is a contract that these shares are not to be liable to any calls on account of the provisions of clauses 4, 5, and 6 of the articles of association. Articles 4 and 5 adopt and confirm the contract of the 30th of November, 1872; and then comes Article 6, which Mr. Cotton and Mr. Whitehorne very much rely upon, but which I regard as a pure fiction, not founded on any fact and not justified on any principle of business or fair dealing, because the company were at the time the owners of the property upon payment of the £66,000, and it provides that the property so to be immediately acquired "belongs and shall be considered to belong to the persons whose names are stated in the schedule to an agreement executed immediately after the registration of these presents, in the proportion set to their names respectively." Now I want to know upon what principle 88] the *company can be entitled to say in the memorandum or articles of association that the property is to be deemed to belong to persons to whom it never did belong, and who had never contributed a single farthing to promote its objects. It is said that Colonel Innes was a trustee for the company at large. He is in this document of the 29th of January a trustee for a portion of the shares only, because 15,000 shares are to be considered as fully paid-up shares. If the company be at liberty to treat 15,000 shares as fully paid up, why not the whole 20,000? It is admitted that they could not justify that. That raises the question which I had to decide in *Crickmer's Case* (1), which is, whether it is competent for shareholders to subscribe to a memorandum of association saying the capital shall consist of a certain number of shares, and by a contemporaneous document to say that every share is to be deemed to be paid up in full;—one document making every share liable for £10, and the other saying that they are not liable to one farthing. I can see not one ray of distinction between this and *Crickmer's Case*. There the memorandum of association provided that the capital should consist of £25,000 in 2,500 shares of £10 each. That means, by the 25th section of the act of 1867, 2,500 shares, each of which is liable to pay the sum of £10. The articles of association of the same date declared that all the shares should be allotted as fully paid-up shares. Here the words are, "shall be considered as fully paid-up shares." The great difficulty in *Crickmer's Case* was this: the Caribbean Company was a clear fraud, intended to deceive; but Crickmer was the holder of shares for value, and the great difficulty was whether Crickmer was

(1) Law Rep., 10 Ch., 614; 44 L. J. (Ch.), 595.

as much liable as the original shareholders would have been to pay £10 on each of these shares; but I was satisfied by the evidence that he was a transferee, with full notice of the transaction, and being such, he was just as much liable as the original allottees of the shares, and as they were liable to the £10 a share, I held he was liable too. I was very clear in the case. The hearing before me is well reported in the *Law Journal* (*), which not only gives the judgment, but some observations made in the course of the argument; for instance, this one (*): "The Vice-Chancellor: *Is [89 not this the question: Can a company or a number of persons associated together, execute the memorandum of association, saying that the capital of their company shall be £25,000, and on the same day execute and register with that instrument another, namely, the articles, saying the capital shall be nothing?" Then there is another point decided on this case. In my judgment (*) I quoted the judgment of Lord Justice Giffard in *In re Baglan Hall Colliery Company* (*): "Taking those sections together, a person who subscribes the memorandum of association is to be held to have agreed to be a shareholder for the number of shares in respect of which he subscribes it, to take them, and to pay a proper consideration for them. The 12th section provides that the memorandum of association can only be altered in certain particulars and in a particular way. If, therefore, the memorandum and the articles are inconsistent, the articles must give way; but there is not any inconsistency between a memorandum, which is general in its terms, and articles which state that the payment for the shares is to be made in a particular way according to the terms of a contract referred to in the articles; nor do I see that payment in kind, according to a subsequent contract with the company, is inconsistent with such a memorandum. If there be a contract of such a nature that on bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal." In part of my judgment (*) I made this observation, which was fully affirmed on appeal: "The register in this instance was strongly calculated to deceive any one who looked at it. At the same time, the whole thing is most extraordinary. To see that nearly all the 2,500 shares should have been at first allotted to one man, who, throughout, was for those numerous shares as many times described and named in the register—to find that the

(*) 44 L. J. (Ch.), 595.

(*) 44 L. J. (Ch.), 596.

(*) 44 L. J. (Ch.), 598.

(*) Law Rep., 5 Ch., 354.

(*) 44 L. J. (Ch.), 599.

columns for the calls on the shares were all vacant, and that for the sum total mentioned as paid on each share, it was £10—to find all that, and to know that it was all utterly false, is indeed astonishing! Every one taking part in the formation of the company must have known the true nature of the transaction. The cases cited really do not govern this 90] one. I think there is a *distinct variance between the memorandum of association and the articles of this company, designed by arrangement for the deception and defrauding of the public; and if the application in this case had been made against an original promoter of the company, instead of a transferee of shares in it, I should have long ago terminated any discussion as to it.” I felt the great difficulty to be whether Mr. Crickmer, as a transferee, and, as far as I could see, an innocent transferee, was liable to that for which the original allottees would, beyond question, have been liable. That case was very speedily taken to the Court of Appeal; but I have no doubt a shorthand writer’s note of my judgment was read to the court, and that being the case, Lord Justice James says (‘): “It appears to me that this appeal is perfectly idle; there is no registered contract in writing in this case. The registration of articles of association inconsistent with the memorandum is not the registration of a contract within the meaning of the 25th section of the act. It must be a contract which shows what shares are to be issued fully paid up, and for what consideration they are to be issued. The appeal must be dismissed with costs.” Lord Justice Mellish says (‘): “I am of the same opinion. The meaning of the articles of association is obscure; but it seems to me to be that the directors shall have power to make presents of paid-up shares. The meaning of the 25th section is that there must be a written contract, by virtue of which the shares are to be issued fully paid up with some person external to the company. That is the thing to be registered, and not a mere contract between the shareholders. Such a clause in the articles cannot be a written contract within the meaning of the act.”

Now what is this contract of the 29th of January which is relied upon? The shareholders contract with themselves that they shall trade and not be liable to the debts of the trade they carry on, and that is gravely argued to be a contract of which the shareholders and creditors have notice. It is a contract to exonerate themselves from the ordinary liability of traders to pay the debts which they incur in the course of their trading. There is no doubt this act of 1867

(‘) Law Rep., 10 Ch., 617.

was introduced to prevent that, and *In re Baglan Hall Colliery Company* (*) decided only, that although a man is *liable to pay for shares whatever the nominal value [91 may be, he may pay in money or money's worth. In that case they paid in money's worth by giving the colliery as a payment for the shares. I thought, and I think still, that that was delusive as regards the public, and that when a company was formed by memorandum of association, it must, to constitute the capital, have money, and that those who dealt with the company had a right to believe that they could resort to the shareholders so far as the shares were issued for the full amount of capital. To that extent, and that extent only, the decision was carried; and in *Fothergill's Case* (*), there being no payment in meal or malt, Mr. Fothergill was held liable for the shares for which he subscribed the memorandum of association. But is this court to give effect to mere fictions, or to allow parties who enter into commercial transactions to say by one document that they will trade with a capital of £200,000, and in the next that they will trade without a farthing? What is the meaning of the expression, "shall be considered as fully paid up"? Are shareholders at liberty to form a company by one document which is most readily accessible to the public, saying the shares shall be so much in money, and then say that every share is to be considered or deemed as paid up in full? That, in my opinion, however intended, and I have no doubt in the present case it was innocently intended, is a contract only calculated to deceive the public, and deceiving the public is defrauding the public, and is contrary to the spirit and object of these acts. *Crickmer's Case* (*), in my opinion, goes the whole length of saying that this contract that the shares shall be deemed or considered to be paid up in full is a mere nullity, when it is inconsistent with the memorandum of association. If the intention is to issue fully paid up shares, it is the duty of those engaged in the formation of the company to provide by the memorandum of association that so many shares shall be issued as shares liable to be paid upon, and so many in respect of which there shall be no liability. In default of that, any stipulation, in my opinion, by the articles of association, is entirely ineffective.

Now, then, it is provided that there must be a contract. What is this contract so much relied upon? It was stated to be a contract *by a certain number of persons hold- [92

(*) Law Rep., 5 Ch., 346.

(*) Law Rep., 8 Ch., 270.

(*) Law Rep., 10 Ch., 614; 44 L. J. (Ch.), 595.

ing shares in this company, that they, the shareholders, shall not be liable. They contract with themselves. There is no person, outside, as the Lord Justice Mellish says in *Crickmer's Case* (*). That is to say, that if a man sells property to a company and enters into a fair and honorable contract that he shall be paid by a certain number of shares, as in this very case Mr. Anderson had done, it comes within the meaning of the 25th section. But this contract is merely a declaration by the shareholders in their own favor, that they shall not be liable to pay any calls. In other words, they will carry on trade on the principle that if profits are made they will take the profits, and if losses are sustained they must be borne by the creditors. It was argued very strongly in *Crickmer's Case*, that the articles of association constituted a contract that the shares should be issued as fully paid-up shares. On that I said in reference to this 25th section (*), "I shall make an observation which the facts of this case for the first time call forth, and it is this: the section speaks of a contract. By that is meant an honest, *bona fide* contract, valid and effective in law, not one that is void and illegal." That was my view of it, and it was affirmed by both the Lords Justices. Mr. Whitehorne seemed to think *Crickmer's Case* turned on the fact of the contract being in the articles of association. I did not decide it on that ground, but I am very clearly of opinion that this contract of the 29th of January, which is registered, is not one iota better than if the very stipulations in that contract were contained in the articles of association themselves. They are in effect so contained, for the contract of the 29th of January merely purports to declare that particular persons are to be the owners, which I have pointed out it was too late to do; it is, in my opinion, analogous to the contract in *Crickmer's Case*; and on the whole case, therefore, I think, without the slightest doubt or hesitation, that Mr. Anderson must be put on the list for 3,520 shares which he held, and which, therefore, on the exact words of the 25th section, are liable to the full call of £10.

From this decision Anderson appealed. The appeal came on to be heard on the 7th of November, 1877.

93] *Anderson appeared in person.

Glasse, Q.C., and *Higgins*, Q.C., for the liquidator.

(*) Law Rep., 10 Ch., 614; 44 L. J. (Ch.), 595.

(*) 44 L. J. (Ch.), 600.

They referred to *Crickmer's Case* (¹), *De Ruwigne's Case* (²), and *Hay's Case* (³).

JESSEL, M.R.: This is an appeal from a decision of Vice-Chancellor Malins, by which he has put a gentleman of the name of Anderson on the list of contributories of the Wedgwood Coal and Iron Company for a very large number of shares, which were issued to him, or to persons who transferred to him, as paid-up shares. Of these shares 1,250 had been transferred to him by a Mr. McDonald under circumstances I am about to mention, and the balance of 2,270 had been *bona fide* bought by him for money in the market. There were several grounds on which the Vice-Chancellor put this gentleman on the list of shareholders. In the first place, the Vice-Chancellor was of opinion that these shares, though issued under a contract registered pursuant to the 25th section of the Companies Act of 1867, were not issued for any consideration; that is to say, he held that the persons who obtained this issue of paid-up shares had no interest whatever in the mine that was sold to the company, though it was stated that they had, and that consequently it was a contract in name only, and therefore without any value. In the next place, his Lordship was of opinion that there was an inconsistency between the memorandum of association and the articles of association, that the memorandum of association having merely said that the company's capital was to consist of so much money allotted in so many shares, and the articles of association having stated that the shares, or rather a large proportion of the shares, were to be issued as paid-up, he considered that was an inconsistency; and he further considered that where there was an inconsistency between the memorandum and the articles of association, even in a matter which the act of Parliament did not require to be put into the memorandum, the memorandum must prevail over the articles. That being so, he *was of opinion that, having regard to the 25th [94 section of the Companies Act, which I have already mentioned, there was no sufficient registered contract; and that, having regard to the memorandum of association, in any event the shares must be treated as shares on which the whole amount had to be paid, and he therefore considered that the purchaser of shares in the market having in fact been a promoter of the company, and having had notice of all these facts, was in no better position than the original allottee; and that as regards the other shares he took them

(¹) Law Rep., 10 Ch., 614.

(²) 5 Ch. D., 306; 22 Eng. Rep., 107.

(³) Law Rep., 10 Ch., 593; 14 Eng. R., 809.

from an agent of his own, Mr. McDonald, and of course with full notice, and that therefore he must be treated as a person who had agreed to take shares which were not paid up at all, and therefore he was liable to be put on the list of contributories for them. These, as far as I gather, are the reasons given for the judgment of the Vice-Chancellor, from which this appeal has been brought.

Now I have the misfortune to differ from the learned judge on almost every point, and that being so, I think it only right to say a few words as to the conclusions at which I have arrived, and the ground for these conclusions. In the first place, I am quite satisfied that the persons who claimed an interest in the equity of redemption either had an interest on their own behalf, or as trustees for others, and that it was not correct to say that the contract with which we have to deal was made without consideration. In the next place, I am satisfied that there is no inconsistency between the memorandum and the articles of association. And in the third place, I am not going to alter men's contracts unless the provisions of an act of Parliament compel me to do so. If a man contracts for paid-up shares with a company, and there is no other contract—that is to say, if there is no previous contract to take shares at all, and the company allots the paid-up shares, and the contract is registered, so as not to be struck at by the 25th section, to which I have referred—it is quite evident that neither party can alter the contract—the company can only insist upon its being performed in the absence, of course, of equitable grounds for setting it aside. If, for instance, the person who has entered into the contract holds a fiduciary position as regards the company, and the contract is not one entered into in such a way as to entitle him to insist upon it, the 95] company may do one of two things: it *may ask to set aside the contract altogether, and in that case the shares would not be treated as allotted at all, and the consideration (being an insufficient one) would have to be returned to the director or other person holding a fiduciary position; or the company may adopt another course, and may treat the director or other person holding a fiduciary position as trustee for the company of the profit made by the contract, and may take away the profit from him; but in that case again it does not alter the nature of the shares allotted. In a case which came recently before the Court of Appeal (¹), the court being of opinion that the director had improperly obtained allotments to himself of paid-up shares, and the

(¹) *Pearson's Case*, 5 Ch. D., 336; 22 Eng. Rep., 127.

company being in process of winding up, and the shares valueless, the court charged the director with the value of the shares at the time they were allotted to him, and made him pay that amount by the summary process pointed out by the 169th section of the act of 1862. But you cannot alter the contract to such an extent as to say, Though you have bargained for paid-up shares, we will change that into a bargain to take shares not paid up, and put you on the list of contributories on that ground. I may say that many of these considerations were pointed out by the Court of Appeal in the case which Mr. Higgins referred to of the *Canadian Oil Works Corporation, Hay's Case* (¹).

Let us look at what the facts are, and it must not be supposed that I am expressing any approval of what has been done, or that I am about to speak in terms of commendation of the mode in which the company was formed: with all that I have nothing to do. All I have to do is to say whether these shares are to be treated as paid up or not paid up. There was a coal mine to sell; what the value of it was I do not know, mining property is of very variable value—but the result was that a Mr. Baddeley and Mr. Anderson agreed to buy the coal mine for what appears to have been a comparatively small sum. Then Mr. Anderson bought up Mr. Baddeley's share, and became, in equity, the owner of the coal mine. In that position of affairs we find an agreement entered into, dated the 19th of November, 1872, in which a Mr. McDonald and a Mr. Black come upon the scene as parties to it; and it recites that they have been authorized to sell the coal mine at a *price fixed by [96 the said owners, and have associated with them Lieutenant-Colonel Innes and Mr. William Stafford, for the said purpose, who have in turn sought and obtained the assistance of Mr. Sheridan to carry out the object aforesaid; and all the said parties have agreed together to form themselves into a syndicate to purchase the property aforesaid, and to form a joint stock company for the purpose of raising the necessary capital for such purpose, and to work the said mines to the best advantage and to their utmost capacity, and have each and all contributed heretofore their best abilities, influence, and energies—that is, I suppose, in the management of it; and then it proceeds: "Now, therefore, it is agreed by and between the parties aforesaid that they will continue their efforts for the formation of the company and obtaining the capital therefor, and that all net profits which may result therefrom, whether in cash, bonds, or shares,

(¹) Law Rep., 10 Ch., 593; 14 Eng. Rep., 809.

shall be equally divided between them." That is signed by Black and McDonald, but it is in evidence, and undisputed, that the other three agreed to it, and in fact it is pretty plain from the next document that they did assent.

Now, what was the effect of that document? It was the formation of a partnership for a limited purpose between those five persons, and that partnership had for its object the purchase of the colliery, the formation of a company, and the selling of the colliery at a profit to the company, as well as the division of the profits between them; it is called a syndicate, but it is really nothing but a partnership. The next document is one of the 29th of November, 1872, which is signed by all five; it is very short, but it carried out an arrangement by which Black and McDonald, instead of taking two-fifths of the profits, were to take shares, and it is in these terms: "We, the undersigned, hereby agree that in consideration of the introduction and services of Black and McDonald in and about the formation of the proposed company, based on the Wedgwood and Lane Ends Colliery, we will, upon allotment of bonds prepared to be issued, transfer to them respectively fully paid-up shares to the extent of £12,500 each." Therefore the arrangement was, though it is not fully expressed in the memorandum, that McDonald and Black were to take £12,500 each in 97] fully paid-up shares, and the other three, *namely, Innes, Sheridan, and Anderson, were to have the benefit of all remaining profits. Then the next thing we find is an agreement signed on the very next day, the 30th of November, 1872, and therefore very nearly contemporaneous, between Anderson, who was the owner of the colliery, and Colonel Innes, who was one of the partners, but of course subject to the rights of Black and McDonald in their £12,500 in paid up shares. By that arrangement Anderson agreed to sell to Colonel Innes this colliery at a very much larger price than he had agreed to pay for it. There is nothing illegal in that, as far as I know; there was no company then in existence. The bargain was that the purchase-money should be £66,000, and it was to be paid as follows: £24,000 in cash on completion, and £42,000 in paid-up shares of a company to be established by Colonel Innes with a nominal share capital of £200,000, for the purpose of taking over and working the said mines and minerals, so that on the face of the agreement there were to be £42,000 in fully paid-up shares at least given to Anderson; and besides that, we know that Colonel Innes contemplated that there should be at least £25,000 more, because they were to

give £25,000 more to Black and McDonald. Then arrangements were made as to the establishment of the company, and a bargain that Anderson should be managing director and should receive a commission on all net profits, and the agreement to remain in force for three calendar months, and so on. Then, on the 30th of November, after the signing of the agreement, what was the position of the parties? Colonel Innes had bought, or contracted to buy, this colliery from Anderson under those two agreements, by which, of course, he became the agent of the partnership in the purchase. He never denied the agency for a moment, or set up that he was the owner of the property; nor could he have done so in equity. The property was bought for the partnership which consisted of the three, subject to the rights of the other two, namely, Black and McDonald, to the extent of their £25,000 interest in the purchase. That being the position of Colonel Innes and Anderson, he might have agreed with Anderson the next day that the company should not be formed, or that any other disposition should be made of the property. It turns out that McDonald was not an independent partner. McDonald was *agent for Anderson, [98 and it seems from the evidence that Anderson had agreed to give him £10,000 in shares for his services, and in consideration of that, whatever benefits McDonald got were to belong to Anderson. That is the effect of it; so that, as between Anderson and McDonald, the additional shares belonged to Anderson on McDonald getting £10,000 in shares; and therefore it appears to me that the other five could have dealt as they liked with the property. That being the position of matters, the company is formed, and it is necessary to consider how it was formed. There is the memorandum of association with some other names signed to it, none of whom can be considered as other than members of the partnership, or as their nominees. It was signed by them for one share a-piece. These people were merely nominees if they were not actual members of the partnership; and there were not and never have been any other members of the company than these signers of the memorandum and the holders of these other so-called paid-up shares. The memorandum of association provides that the capital of the company shall be £200,000, divided into 20,000 shares of £10 each.

Now there are provisions in the articles of association showing that it was intended to issue a portion of the shares as paid-up, and the learned Vice-Chancellor was of opinion that those provisions were inconsistent with the provisions

of the memorandum, but I cannot find that it is so. Having myself a very large experience in these matters, both at the bar and on the bench, I think I can safely say that that is the usual form, and that the fact of the shares being paid up is not usually noticed in the memorandum of association. In fact, I have very seldom seen it noticed, and I am confirmed in my view of the practice by the opinions of both the learned Lords Justices sitting with me. It is stated in the articles of association that part of the shares are paid up, but in neither the memorandum nor in the articles of association is there anything either affirmative or negative as to the mode of payment. It may be by cash payment, or by taking of that which the company consider of equivalent value. Saying that the capital shall be of that amount is not a statement that the actual cash capital to be paid shall be of that amount, and I, for one, do not see any inconsistency. But if there were, why should one of two contemporaneous documents control the other? I am not now speaking of those portions of the memorandum of association which the act of Parliament requires to be stated in the memorandum. Something might be said on that question, but all the act of Parliament requires to be stated is the amount of capital for which the company is proposed to be registered divided into shares of a fixed amount. It does not prevent your stating that the shares are to be paid for partially in money and partially in property, or even partially in property or partially in remuneration for services; there is nothing about that in the act of Parliament.

Where there are two contemporaneous documents executed and assented to by the same persons at the same time (and these really are so substantially, and are therefore to be treated as contemporaneous documents), it appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together, so that if there is any ambiguity in one it may be explained by the other; and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency. Now, when you come to look at the articles of association you find that the 5th article states, after saying what the objects of the company are to be, "In acquiring the leases, estates, mines, minerals, fixtures, plant, machinery, tools, buildings, and other properties, matters, and things, the immediate acquisition of which are specified in the memorandum of association as among the objects for which the company is established, the company shall confirm, and hereby does confirm and

adopt the agreement dated the 30th of November, 1872, made between Anderson of the one part, and Innes of the other part, and shall, as speedily as possible after its incorporation, obtain a complete legal assignment and transfer to itself of all the premises so to be immediately acquired. The said premises so to be immediately acquired belonged, and shall be considered to have belonged, to the persons whose names are stated in the schedule to an agreement executed immediately after the registration of these presents in the proportions set opposite to their names respectively, and in regard thereto the shares in the company's capital numbered 1 to 15,000, both inclusive, shall be *considered [100 as fully paid up, and shall be allotted to and taken by the said persons, or by persons to be nominated by them, in the proportions respectively mentioned in the said schedule." Now I have little doubt that that document was really prepared, and it is said it was to be executed immediately afterwards, though in fact it was not executed immediately afterwards. The 16th of December, 1872, is the date of the memorandum of association, and the agreement was only executed in the following year. It was executed on the 29th of January, 1873, but though it bears that date, no doubt it was prepared and intended to be executed at the time.

Now, what is the effect of these two articles together? It is not the simple adoption of the contract with Colonel Innes, but it is the adoption of that contract subject to the payment of 15,000 shares fully paid up to other people; they take it subject to that payment. That is the arrangement set forth in the articles. That alone is, no doubt, not a sufficiently registered contract within the meaning of the act of 1867, but it does state fairly that they are going to acquire the property not merely subject to the payment of the money, which is arranged to be paid partly by Colonel Innes to Anderson, but also subject to giving 15,000 paid-up shares to the persons to be named; and I think no one who read these articles of association could doubt for a moment that that was the fair meaning of them, and no one who read them with any care could avoid being led to inquire who were those persons. That was mentioned in the registered contract. It is dated the 29th of January, 1873, and I refer to it now because it seems to me that, in the natural order of things, it ought to come in here, as it is the agreement stated in the articles of association to be executed immediately afterwards. The agreement recites the contract of November, by which Anderson sold to Colonel Innes, and then it

recites, which is not quite accurate, though in substance it makes very little difference, that Innes declared he entered into the agreement as trustee for the parties of the second part in the proportions set opposite their names respectively, and then in those proportions their names are put in the schedule. It is not worth while to notice for this purpose that there was an exception of the fire-clays out of the [101] *original agreement, which the company were not to have at all; it has a bearing upon one point, but not upon this. Black and McDonald were to have £12,500 each, and their interest arose in the way which I have mentioned. The other people there mentioned, as I may state shortly, were these: First of all there were the solicitors of the promoters, who were paid, not in money, but in paid-up shares; they were nominees of the promoters, and took a portion of their payment in shares. Then there was Colonel Innes, and Anderson also, who takes a share; Black, who takes a share (he is a promoter); and Mr. Cooke, who takes a share, he being a nominee and trustee for Sheridan. The result, therefore, is this: that it is simply carrying out the original agreement between the syndicate or partnership by which Anderson sold to Colonel Innes as trustee for this syndicate or partnership, the only difference being the substitution of the nominees for members of that partnership. That contract was registered, and therefore was not struck at by the act of Parliament; and the only question is, whether the two instruments which I am going to read, and which it is now necessary to refer to, affect that contract.

Now what happened was this: The company wanted money, of course, and they intended to raise it, not by issuing shares at all, but by issuing debentures; they thereupon—that is, after the formation of the company—issued a prospectus, the promoters being in fact themselves directors. Anderson was a director, and so was Colonel Innes. They issued a prospectus inviting people to take debentures. I have looked carefully through the prospectus to see if there is anything which in law could be considered as misrepresentation in it, and I must say I cannot find that there is. The issue of debentures was to the amount of £60,000; they were for £25 each, bearing interest at the rate of £10 per cent. per annum. People who lend money at 10 per cent. per annum do not, I suppose, expect that they get a first-rate security, or, at all events, if they do expect it, they are likely to be disappointed. It is “to enable the directors to further develop this well-known property,” that is, the Wedgwood Coal Mine, and “the property is

assigned for payment of the interest." Then, after stating how they are to take their dividends, and so on, it says: "The shareholders of the *company are to take their [102 dividends only after the above payments have been made." That is the only reference I can find to the shareholders at all, and they come after the debenture holders. Then it states what the property is—valuable seams of coal and ironstone, and that it will pay more than enough to provide for these debentures. It seems to be very sanguine, but still the public were told exactly what it was and what were the estimates which had been made. Then there is this clause: "The contract for the purchase of the property, dated the 30th of November, 1872, made between Mr. Anderson and Colonel Innes, together with the memorandum and articles of association, &c., may be seen at the offices of the company." Now, it appears to me, if anybody had gone to the office and looked at these documents, he would have had ample notice that this arrangement as to the 15,000 shares was to be carried out. You cannot say it was concealed at all; it was not set forth on the face of the prospectus, but it was not concealed, nor was any representation made on the prospectus that the security offered was any personal liability of the shareholders, or any contribution of share capital. Nothing of the kind was offered to the public, all they were offered was the security of this which they were told was considered by the people who were offering it to be a valuable property, and that they anticipated a revenue from it sufficient to pay their interest eventually; and it does not appear to me, therefore, that there was any misrepresentation in that prospectus.

Well, now, the way they intended to secure the debenture holders was to give them a first charge on the property; but I certainly cannot compliment the draughtsmen on the form of conveyance which was adopted. Instead of stating the facts and making a proper assignment, making the members of the syndicate parties, what they did was this, they make an agreement which, though dated the 13th of January, one must treat as contemporaneous with the other documents, by which Colonel Innes of the one part, and the company of the other part, stated that Colonel Innes, in agreeing to purchase the said property, was only acting as trustee for and on behalf of the Wedgwood Coal and Iron Company, Limited, who were purchasing "to the extent and in the manner hereinafter appearing." I do not admire conveyancing of *this kind, which is simply stating an un- [103 truth instead of stating the facts properly. Of course at

the date when Colonel Innes consented to enter into the contract, as I have before shown, he was not acting as trustee for the company, because there was no company in existence: he was merely trustee for the syndicate, and for no one else. Then it goes on to say that Colonel Innes, after he has had the property assigned to him, will, as soon as practicable, assign it to the company, except the fire-clays. Of course the whole would belong to the company, the trustee could not keep the fire-clays for himself. It is obvious on the face of it that it is a mere conveyancing contrivance in order to effectuate the next document, which was a memorandum of agreement entered into on the same day, the 13th of January, between the Wedgwood Coal and Iron Company and some grand people who are trustees of the company, and then there is a declaration that the Coal and Iron Company shall, as soon as practicable, after Colonel Innes has assigned to them, execute a legal mortgage of the property, with all necessary and usual provisions, to the debenture holders for the advances made to them in accordance with the terms of the prospectus. That is the document which, no doubt, is called in the prospectus the deed securing the property to the trustees. There is no other deed, and that must be the document.

Well, then, it appears to me that when you look at these two documents it is impossible to suppose that any persons intended to vary their rights in the equities of redemption. First of all, Colonel Innes alone, as trustee for himself and others, could not transfer to the company that which did not belong to him; even supposing the whole arrangement had been carried out with the full knowledge of the other parties in the syndicate, the only effect would have been that they standing by would not have been entitled to assert any equity against the debenture holders in priority to their debentures. And that was indeed what they intended, but in no way could it change the nature of the transaction even if Colonel Innes had intended to do so. He had no power to do it, but I am satisfied that there was no intention of doing it, and that the meaning of the transaction was simply to make a good charge in law on the property in favor of [104] the debenture holders, *and nothing more. It appears to me, therefore, that there is nothing in the documents, if rightly looked at, to alter the rights of the persons who, as I think, had the substantial interest in the equity of redemption.

That being so, it appears to me there was consideration, valuable in law at all events, given for this contract, and

that being so, that the contract was valid, and therefore that the persons who executed the contract were entitled to have the shares allotted to them which were allotted, and that they were properly allotted as paid-up shares.

But assuming that all that is erroneous, and that there was no sufficient consideration, even then I do not see how the respondent could succeed. The act of Parliament, no doubt, says the contract shall be registered, but it is only to be "a contract duly made in writing." The contract, if impeachable for want of consideration, or for want of sufficient consideration, must be a contract made in writing, and it complies with the terms of the act of Parliament if it is registered before the issue of the shares, and then you would be thrown back on the general law, and the general law, as I have before explained, does not make a new contract for a man. If you set aside this allotment of shares, you must set it aside altogether, and then you cannot make the holder of them a contributory; and if you do not set it aside altogether, you must adopt it, and the utmost you can do is, as I said before, that you can take away any profit from the person who has improperly made it. So that it appears to me, even if they had not given (as I think they have given) a valuable consideration, still the moment you have a duly registered contract the 25th section of the act does not apply.

Well, then, a suggestion was made which was not one of the grounds of the Vice-Chancellor's judgment, that you cannot have a contract under this section with a director or promoter, and observations were made with reference to *dicta* of the late learned Lord Justice Mellish in *Crickmer's Case* (¹), where he said that the contract must be with some person external to the company. As I understand him, what he meant was this. The case before him referred to the mere registration of the articles of association, that is, *the articles constituting the company, and it was [105 decided that it was not a sufficient contract. What he meant by "external" was not being a part of the original constitution of the company, but a contract made by the company as a corporation and somebody else. But that somebody else might be a director or promoter. He did not say he must be a person unconnected with the company, but that the person must be external to the company, that is, a person external in the sense I have mentioned as not being one of the members of the company, merely co-operating in the formation of the company. That appears to me to be the

(¹) Law Rep., 10 Ch., 614.

only fair interpretation that can be put upon his words which is in my opinion consonant with the law of the case.

On these grounds it appears to me that the judgment of the court below cannot be supported, and that the appeal should be allowed.

BAGGALLAY, L.J.: I propose to consider the circumstances of this case and the law applicable to these circumstances under three heads. In the first place, the circumstances which occurred prior to the preparation and registration of the memorandum and articles of association on the 16th of December; secondly, the preparation and registration of these documents; and thirdly, what took place subsequently to the registration of the documents.

Now we have, I think, this fair inference from the evidence in the case, that on the 29th of November, 1872, Anderson had contracted to sell, or was under an engagement to sell, the mines and minerals for £66,000, and a syndicate had been formed for the purpose of completing the purchase from Anderson and reselling the property to a company to be formed for the purchase of it, and which syndicate were to share the profits on the resale between themselves. On the 30th of November Colonel Innes, on behalf of himself and the other members of the syndicate, entered into a formal contract with Anderson for the purchase of the property for £66,000; and there can be no question but that the syndicate had a perfect right to enter into the contract to purchase for £66,000 and to sell to a company promoted and formed by themselves for an increased price, and to take [106] the benefit of that profit, *and to divide it amongst themselves as they thought fit, provided they did it in a proper manner.

One of the essentials of their doing this in a proper manner was that those whom they invited to come forward and be shareholders, or in any way to take an interest in the company, should have full notice of the fact. Then had the persons who were invited to become shareholders, or had others who would under ordinary circumstances have dealings with the company, notice of the profit which the syndicate was about to make for themselves?

To answer this question we must consider the circumstances of the formation of the company. It was started by the memorandum and articles of association alone. There was no prospectus inviting shareholders to come forward, and therefore the operation of the 38th section of the act of 1867 would be excluded. The memorandum contained, in accordance with what appears to me to have been the usual

practice, a mere statement of the amount of capital, the number of shares into which it was divided, and the amount of each share ; this is all that the act of Parliament requires. I certainly do not ever remember myself to have seen a memorandum of association in which, when it has been the intention that a portion of the share capital should be issued in the form of paid-up shares, that intention was referred to on the face of the memorandum.

Now with reference to what has been called an inconsistency between the memorandum of association and the articles of association, I assent to the proposition that if there is an inconsistency between the two, then the memorandum of association would prevail in respect of those matters for which the memorandum is required to provide. For instance, if the memorandum of association stated the capital to be £200,000, and the articles of association stated it to be £500,000, there would be a clear inconsistency and the memorandum would prevail ; but I do not see that there is any necessary inconsistency if the articles of association add to the information which is given by the memorandum of association. For instance, supposing the memorandum to have provided that the capital should be £200,000 divided into a certain number of shares of a certain amount, and the articles of association to have added that the capital of *£200,000 [107 should be divided into A shares and B shares, and that there should be a preferential dividend as far as regards the A, or as far as regards the B shares, I see no inconsistency between the articles of association and the memorandum of association in such a case. Nor do I, in like manner, see any inconsistency between the two because the articles of association mention that certain shares are to be treated as paid-up shares, and state the number of shares to be so treated.

Before commenting on the articles, I must say a few words with reference to the 25th section of the act, which was considered to have an important bearing on the case by the Vice-Chancellor, though that view was not strongly pressed by the counsel who have argued the case, and I desire to refer to this for the further purpose of making some observations with regard to *Crickmer's Case* (1), upon which reliance has been placed by the respondent. The wording of the section in question is this, that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed

(1) Law Rep., 10 Ch., 614.

with the Registrar of Joint Stock Companies at or before the issue of such shares." The view taken by the Lords Justices in *Crickmer's Case* was this. Lord Justice James says, referring to the contract that was to be registered: "It must be a contract which shows what shares are to be issued fully paid up, and for what consideration they are to be issued." Lord Justice Mellish says: "The meaning of the articles of association is obscure, but it seems to me to be that the directors shall have power to make presents of paid-up shares," and when you refer to the articles of association in the case which was then before the Lords Justices, no consideration whatever was expressed, but it was a mere power to the directors to issue certain paid-up shares, and no consideration whatever was expressed in the contract as to the purpose for which these were to be so issued. Now let us see how that is in the articles of association with which we have to deal. We have arrived at this conclusion—that there is a syndicate who are to purchase at 108] a price of £66,000, and are to sell to the company *at a profit. Is that circumstance told? Is that contract stated on the face of the articles, and if it is stated on the face of the articles, is the consideration shown? First of all we have the 5th clause, which provides, that in acquiring the leases of the estates, mines, &c., the company would adopt the contract of the 30th of November, which had been entered into between Anderson and Innes. Then that was followed by the 6th clause, which I think, when we read the clause through, states not only the nature of the contract, but the consideration for the contract under which the syndicate took the profits for themselves. It tells us that the property so to be acquired shall be considered to have belonged to the persons whose names are stated in an agreement to be executed after the articles have been registered, and that in regard thereto "the shares in the company's capital numbered from 1 to 15,000 shall be considered as fully paid-up, and shall be allotted to and taken by the said persons, or by persons to be nominated by them, in the proportions respectively mentioned in the said schedule." It appears to me that nothing can be more clear than the statement in the articles that the property which had been acquired by the company belonged to those persons who are to receive 15,000 shares of £10 each fully paid up as purchase-money, and that the consideration for the issue of that 15,000 was the making over to the company of the property which at the time the articles were formed belonged to these several parties.

Well, if that be the case, it appears to me that it is not within *Crickmer's Case* (¹), where no consideration whatever was stated. Here you have not only the contract in respect to which these 15,000 paid-up shares were to be allotted, but you have the consideration for such issue, and you have the reference to a certain document from which you can at once ascertain who the parties are to whom the issue is to be made. They are to be either those whose names are in the schedule to that document, or persons to be nominated by them; and this further information is afforded by the agreement of the 29th of January, 1873, which was registered after the formation of the company, but before the issue of the paid-up shares. Thus you have these facts published—that the syndicate consisted of five persons in addition to Anderson, *whose names have been already referred [109 to—Black, McDonald, Innes, Sheridan and Stafford—and almost immediately after the registration of this memorandum and articles, you have the agreement executed by those persons and registered, stating the proportions in which they are entitled to share in the 15,000 shares. 4,200 of these shares were allotted to Anderson, in part consideration of the purchase-money to be paid to him. The remaining portions which represented profit were allotted among the several persons who composed the syndicate, or in one or two instances, to their nominees.

Now it is a singular circumstance that no shares were issued at all with the exception of those paid-up shares, nor has any person been sought to be put on the list of contributors with the exception of those who hold from the original allottees of these paid-up shares or derive title from them, so that all the shareholders had full notice of the profit taken by the syndicate. But it is suggested that the debenture holders are injured in this respect, and that they are not bound by what has taken place. The 8th article of association provided for the debenture holders, and all that was provided was that before offering or issuing to the public any debenture a trust or covering deed is to be executed.

What is to be a proper indenture or covering deed appears from the remaining clause, "The debentures to be issued as aforesaid shall be the first charge on the property of the company." Then you have that—which I quite agree with the Master of the Rolls was rather clumsily done—you have got that which was the necessary precedent to the issue of the debentures in the transaction of the 13th of January. For some reason it appeared—and it was so recited on the

(¹) Law Rep., 10 Ch., 614.

face of one of the deeds of the 13th of January—that an immediate conveyance from the persons to whom the legal estate in this property was vested could not at once be obtained. Therefore you have, in the first place, the agreement between Innes and the company that he would, as soon as possible, procure a proper conveyance of this property, so that it might become vested in the company. That was perfectly right. As soon as the company had paid the purchase-money, that is to say, had paid what Anderson was entitled to, and had allotted those 15,000 shares to the syndicate, it [110] was quite right *there should be either an actual conveyance of the property to the company or a declaration of trust in their favor. It did actually precede the issue of the shares. But the issue of those shares was entirely in the hands of those who entered into the transaction, and therefore there is nothing whatever in the fact that the declaration of trust preceded, although possibly it ought, in strictness, to have been contemporaneous with, the issue of the shares.

Then the second deed was simply an agreement between the company and certain trustees for the debenture holders, by which the company agreed that as soon as the property was made over to them by those trustees it should be made over to the trustees of the debenture holders. It appears to me there was nothing in the circumstances of the case from beginning to end which showed that this was other than a valid transaction in its inception, and a transaction which has been carried out in a way which certainly, so far as regards the present application to the court, cannot result in any liability to those who took the shares referred to in the schedule to the contract dated the 29th day of January, 1873, so as to leave them under any liability in respect of those shares.

There is no evidence of any contract whatever on the part of these parties to take any shares otherwise than fully paid up, the consideration for which had been previously expressed. As regards the shares in respect to which it is now sought to place Anderson on the list, he purchased in open market from the original parties to that deed of the 30th of January 2,270 of those shares. As regards the other 1,250 shares he appears to me equally to have purchased them for valuable consideration from McDonald, a person entitled to those shares under the agreements of the 29th of November and of the 29th of January, 1873. For these reasons I agree with the conclusion that the Master of the Rolls has arrived at—that this appeal should succeed, and

that Anderson should not be placed on the list of contributories.

THESIGER, L.J.: I concur with the other members of the court in thinking that this appeal should be allowed. But in a case of this importance, especially where we are differing from the judgment of the learned *Vice-Chancellor, I think it right that I should express my views in my own language on the different points which have been discussed on the appeal. It appears to me that there are involved in the judgment of the learned Vice-Chancellor three questions, all of which have been answered unfavorably to the appellant in the present case.

The first of these questions is, whether or not the document of the 29th of January, 1873, which it is admitted was registered under the 25th section of the Companies Act, 1867, was a real *bona fide* contract, or was a mere sham, as seems to have been the view of the learned Vice-Chancellor, having no real facts corresponding to the statements contained in the document. The second question involved in the judgment is, whether or not, assuming the document to be a real *bona fide* contract in itself, anything had occurred to prevent or estop Anderson from setting up that contract as a bar to his being placed on the list of contributories in respect of unpaid shares. And the third question is, whether or not, assuming the contract to be a real one—assuming there to be nothing to estop Anderson from relying upon that contract—it was a contract at all within the meaning of the section to which I have referred.

Now, to take the last point first, the learned Vice-Chancellor in his judgment seems to have proceeded almost entirely (I think I may say entirely) upon the assumption that this case is undistinguishable from *Crickmer's Case* ⁽¹⁾. In that view I cannot concur. In *Crickmer's Case* there had been, prior to the registration of the memorandum of association of the company, an agreement made between one of the promoters of the company and a person named Oliver, under which, when the company was formed, the whole of the shares, with the exception of the seven shares subscribed for in the memorandum of association, were to be transferred as fully paid-up shares to Mr. Oliver, the consideration being the transfer to the company of a concession which Oliver had previously obtained. That contract was not registered, and the only mention made of the issue of any shares as paid-up shares was to be found in the articles of association which, as has been mentioned by Lord Justice Baggallay,

⁽¹⁾ Law Rep., 10 Ch., 614.

[112] did not state the *consideration for which those shares were to be issued as paid-up shares. At the same time, in my view of the decision in *Crickmer's Case* (¹), it did not proceed on the footing of any question of consideration, but proceeded upon this footing, that the articles of association, which were mere arrangement between the subscribers to the memorandum, confirming the constitution of the company and the mode in which the company was to be constituted and managed, did not in themselves form a contract within the meaning of this section of the act of Parliament to which I have referred; and although the Vice-Chancellor relies upon, or rather refers to, a *dictum* of Lord Justice Mellish as to inconsistency between the articles and the memorandum of association, I do not gather that the judgment in that case was founded upon that inconsistency, but I do gather that it was founded simply and solely upon the footing that there was no contract in the case at all.

Here, however, we find a very different state of circumstances. We find not only that the articles of association set out the fact that a certain number of paid-up shares are to be issued, not only do they set out substantially what was the consideration for the issue of those paid-up shares, but we find also the articles of association followed by a document, which undoubtedly purports to be a contract and a contract made between the company, who are parties to the contract, and the different persons whose names are subscribed to the document; and therefore it seems to me that *Crickmer's Case* has really no proper bearing upon the decision of this case, and that we have what did not exist in *Crickmer's Case*, namely, an actual contract—assuming that it was not a mere sham—which could be registered and which had been registered under the act of 1867.

There is only one observation that I wish to make with reference to sect. 25 of the act of 1867. I do not wish it to be supposed that I in any way dissent from the view which was expressed by Mr. Higgins, that under the term "contract" used in that sect. 25, the document would not come within those terms where there really was no consideration at all. I think it may very fairly be said—at all events I do not [113] dissent from that view—that *under the word "contract" is intended a contract binding in law, which of course imports a consideration, although we may not be able to go into the question of what was the value of the consideration.

So much then for the first question involved in the judg-

(¹) Law Rep., 10 Ch., 614.

ment of the learned Vice-Chancellor. Now, let me come to the next question, Was there or was there not a real *bona fide* contract, carrying with it and importing a consideration for that contract, or were all these transactions culminating in the agreement of the 29th of January, 1873, a mere sham, without any circumstances corresponding to the statement in the document? I think that the facts (and I do not propose to go into them in detail, because the learned Master of the Rolls has dealt with them) show that the view of the learned Vice-Chancellor on this point cannot be supported. In March, 1872, Anderson seems to have obtained a right in equity to the property in question. He purchases first a moiety of that property, and he had a right, in the event of the formation of the company, to acquire the other moiety of the property on the payment of £7,500. As early as November, 1872, negotiations seem to have been set on foot between Anderson and Colonel Innes, who represented not only himself but other persons classed together with him under the term "syndicate," the object of which was that Anderson should sell to this syndicate, and that the syndicate should make such a profit as they could make out of the formation of the company, and a transfer of the mines in question to that company.

The judgment of the learned Vice-Chancellor seems to have proceeded upon the footing that throughout Colonel Innes, in becoming the purchaser, or agreeing to purchase the property in question, was simply acting as trustee for the company, and was bound to convey to the company any profits which he might make out of the transaction, or rather was bound, as regards the company, to make no profits. Whatever might be right under the circumstances of the case between the company and Colonel Innes, I cannot see anything that corresponds with that idea of the Vice-Chancellor's. It is admitted that there is nothing in the agreement of the 30th November, 1872, to show that Colonel Innes was not purchasing for his own benefit, and when we look to the circumstances *and see what had taken [114 place on the 19th and 29th of November, immediately preceding the agreement to which I am referring, it is obvious that Colonel Innes had arranged with the other members of the syndicate that he would become purchaser of the property in question, and that he would hold that property not solely for himself, certainly not simply for the benefit of any company, there being at that time no company formed and therefore no obligation between any company and

Colonel Innes, but for the benefit of himself and of the other members of the syndicate.

We go further and we come to the articles of association. Is not the same idea and the same view patent to anybody who reads those articles of association? I think it must be. I think that the effect of articles 5 and 6 of these articles of association is to show that inasmuch as Innes had made this purchase for the benefit of himself and the other members of the syndicate, they had determined that their profit should be obtained from the allotment to them when the company was formed of 15,000 shares, making a nominal £150,000 of money, which of course might be divided between the syndicate in such proportions as they might think proper, or might be paid by them to any other person who had assisted them in the carrying out of the promotion of the company. And finally, we have the agreement of the 29th of January, 1873, which is quite consistent with the articles of association, and seems to carry out the intentions of the parties from the 19th of November, 1872, for the agreement provides that these 15,000 shares should be allotted in certain proportions to the members of the syndicate, and to certain other persons who, according to the evidence in the case, had given a certain amount of assistance to the members of the syndicate. Therefore, upon this question of fact, the conclusion at which I have arrived is that the agreement of the 29th of January was a real *bona fide* transaction. I have not to deal with the question of whether it it was such a transaction as I should feel disposed to commend.

The only remaining question is, Can we find anything in the documents of the 13th of January, 1873, which would make it inequitable to set up, or in any way prevent or estop the appellant from setting up, that agreement of the 29th [15] of January, 1873, *which has been registered under the act? Now, I must say that, speaking for myself, I could have wished to see the documents drawn up in January, 1873, made more explicit; but I cannot concur in the view that it is the draftsmen who were to blame. I cannot help thinking that those who were engaged in the promotion of this company, those who were occupied in the obtaining of persons who would advance their money on debentures, might have been a little more explicit, might have stated what was the real nature of the transaction, and in that way, at all events, without imposing upon them the trouble of going to the place where the articles of association are registered, might have given the trustees for those who subscribed their

money full information of what was the nature of the transaction.

On the other hand, I feel bound to say, in fairness to the gentlemen promoting this company, that we do not find in the prospectus issued for the purpose of inviting persons to take debentures any misrepresentation; nor do we find any representation beyond this—that they would have the security of the property, which security undoubtedly they had. And also it seems to me that, to a certain extent, the statements made in the document of the 13th of January, 1873, may be taken to represent a correct state of facts. In one sense, at that date Colonel Innes was holding that agreement which he had made in November, 1872, as trustee for the company; but trustee under what circumstances and of what company? Not a trustee who was bound to let the company have the property simply on the footing of the £66,000 to be paid, but of a company one of the very incidents of the constitution of which was this—that to those who had become owners or interested in the property, to those who were about to transfer the property to the company, there should be a transfer of 15,000 shares fully paid up; and the debenture holders, or proposed debenture holders, had nothing to do but to go to the office where the articles of association were registered, and see for themselves what was the nature of the transaction, what were the shares to be issued fully paid up, and in that view, then, they could not be in any way deceived. At all events, whatever view may be taken on the question, whether or not these agreements should have been framed in the way in which they have been framed, I cannot myself find anything in *them which would [116 justify any court in holding that they prevent or estop Anderson from saying that he had bargained to take, or rather had taken, either by transfer or through the hands of his nominee McDonald, paid-up shares; and in respect of those shares demanding that he should not be placed on the list of contributories.

Under these circumstances I think that the appeal should be allowed, and that Anderson's name should be removed from the list.

Solicitors for the liquidator: *Mercer & Mercer.*

[7 Chancery Division, 116.]

C.A., Nov. 16, 1877.

BUTLER V. BUTLER (').

[1875 B. 17.]

Breach of Trust—Liability of one Trustee—Insufficient Security—Sale in Absence of Cestuis que Trust.

Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due from him to the defendant. The other trustee filed a bill against the defendant, alleging that the security was insufficient, and asking that the security might be realized, and that the defendant might make good any deficiency:

Held (affirming the decision of Fry, J.), that the plaintiff had no equity to make his co-trustee primarily liable; and that the court would not direct a sale of the property in the absence of the *cestuis que trust*.

THIS was an appeal from a decision of Mr. Justice Fry (').

John Butler, Walter Butler, and Jane Sarah Butler, were the trustees and executors of the will of John Butler, deceased, and as such held a considerable sum of New £3 per Cent. Annuities in trust of the testator's children and grandchildren. The will authorized the trustees to invest the funds on mortgage.

Walter Butler owned land near Croydon, and agreed to sell it to a builder named Arnold. The trustees advanced to two persons named Fennell and Stead, who were associated with Arnold, a sum of money amounting to £5,850 [117] out of the trust funds, on mortgage *of the land formerly belonging to Walter Butler, and the houses built thereon by Arnold, Fennell, and Stead. Of this money, £4,858 was received by Walter Butler from Arnold; as to £1,250 of it in payment of the purchase-money for the land; as to further part in repayment of advances made by Walter Butler to Arnold to assist him in building the houses; and as to the residue in or towards satisfaction of other sums due from Arnold to Walter Butler.

In January, 1875, John Butler filed a bill against Walter Butler and George Huntley (who had been appointed a trustee in the place of Jane Sarah Butler), alleging that he was induced by the solicitations of Walter Butler to make the advances, and only agreed to an advance on condition that Walter Butler should be personally liable for repayment, and that the mortgaged houses were a very insufficient security for the debt. The bill prayed that the mortgage securities might be realized, and that Walter Butler might

(') Affirming 5 Ch. D., 554; 22 Eng. Rep., 296.

be decreed to make good to the estate of the testator, if necessary, the principal moneys and interest due on the mortgages.

The defendant Walter Butler, who was a solicitor, denied that he had given any guarantee; and alleged that the plaintiff was well aware of the business relations between the defendant and Arnold, and knew how the mortgage money was applied by Arnold; that the plaintiff was himself a solicitor, and was well acquainted with the value of the property at Croydon; and he denied that the property mortgaged was an insufficient security.

Evidence was gone into on both sides, the result of which was that the plaintiff failed in proving that any guarantee had been given by the defendant Walter Butler; and that the plaintiff was proved to have known that part of the mortgage money would go to Walter Butler in payment of the purchase-money for the land, but there was no proof that he knew of the other sums of money due from Arnold to Walter Butler.

Mr. Justice Fry held that the plaintiff failed in establishing his claim to relief, and dismissed the bill with costs. From this decision the plaintiff appealed.

J. H. Palmer, Q.C., and Nugent, for the appellant: We rest the plaintiff's claim to relief, not on the guarantee alleged to have been given by the defendant, as the evidence is *not conclusive on that point, but on the equity [118 which arises out of the transaction. No trustee is allowed to derive a personal benefit from an advance of trust money; and if he does, he is bound not only to indemnify the *cestui que trust*, but also his co-trustee, against any loss that may occur. It is said that the plaintiff knew how the money was applied, but that is not strictly true, for he only knew of the application of such part of it as was due for purchase-money, and was in fact a lien on the property. But however that may be, a trustee is not estopped by his knowledge of the breach of trust when it occurred from calling upon his co-trustee, who has committed the breach of trust, to make good the fund and to account for the profit which has been made by it: *Fuller v. Knight* (1); *Baynard v. Woolley* (2); *Fyler v. Fyler* (3); *Earl Powlett v. Herbert* (4). *Raby v. Riderhalgh* (5), which was cited by the learned judge in the court below, is no authority against the liability of a trustee in such a case as the present. The

(1) 6 Beav., 205.

(2) 20 Beav., 583.

(3) 3 Beav., 550.

(4) 1 Ves., 297.

(5) 7 D. M. & G., 104.

fact that the *cestuis que trust* are not parties is no objection to the suit: *Franco v. Franco* ⁽¹⁾.

Bristowe, Q.C., and *W. W. Cooper*, for the defendant, were not called on.

JAMES, L.J.: It appears to me that this bill is entirely misconceived. The case made by the bill, if it can be proved, is a case of personal indemnity—an obligation by the defendant to make good any loss which may arise from the investment in question, whether it arises from the securities proving ultimately insufficient, or otherwise. That was the case which the bill was intended to raise, and which, in the judgment of the learned judge (which in that respect has not been questioned by the appellant), entirely failed; that is to say, the judge was of opinion, and that has been submitted to, that no such promise was made as was averred in the bill, and he was of opinion that the substance of the case had failed entirely. That is also my opinion.

[19] *Then it is put upon this, that the money was lent by a breach of trust to which both the plaintiff and the defendant were parties; and therefore, being both parties, each of them would have a right to have the trust moneys made good. But the suggestion that there was a breach of trust at all is a mere suggestion made at the bar for the purpose of endeavoring to obtain some relief in a suit which has entirely failed for the purpose for which that suit was originally instituted. The whole allegation in the bill is against the notion that there was any breach of trust. It is true that indirectly the trust moneys found their way into the hand of one of the trustees, that is to say, in payment of a debt due from the mortgagor; but the allegation in the bill is that the plaintiff and the defendant being authorized to make an investment upon a security of the kind in question, the plaintiff, who alleges that he has great personal experience and knowledge in the value of the land and buildings, arrived at the conclusion, after personal examination and inspection of the property, that a certain sum of money might be fairly and properly lent upon that security, and thereupon the security was taken for the money. There is no allegation of any breach of trust in that. All the cases which have been referred to, so far as they could affect the case of breach of trust, have no bearing upon the case before us. I agree with what Mr. Justice Fry says in his judgment, that you cannot go into remote consequences for the purpose of sustaining a bill of this kind. If two trustees will sell out stock and hand the money

⁽¹⁾ 3 Ves., 75.

over to one, no doubt that one can be made to repay, but the indirect benefit which a creditor gets from trust moneys being lent to his debtor upon insufficient security is too remote, unless the thing was a fraudulent scheme, which is not alleged here. If there were a wilful lending upon insufficient security, that might raise a different question. Nothing of that kind is raised here. All that is said is that in the result some of the moneys lent upon insufficient security were paid in discharge of a debt due from the mortgagor to one of the trustees. That certainly does not come anywhere near any of the cases which have been referred to, and is not the case made by the bill, or intended to be made by the bill.

I am therefore of opinion that the plaintiff has wholly failed *upon that part of his case. I also agree with [120 what Mr. Justice Fry is reported to have said, that with regard to the question of a trustee filing a bill to enforce a security, it is very difficult for one trustee to file a bill against another trustee to realize that security in the absence of the *cestuis que trust*, who might prefer to allow the money to remain. They have a right to be heard upon that question. I am of opinion that the appeal fails, and ought to be dismissed with costs.

BAGGALLAY, L.J.: I am of the same opinion. Mr. Hinde Palmer has pressed very strongly upon us that unless we allow this appeal and make a decree to the effect which he has asked, we shall be running counter to the authorities by holding that a trustee can commit a breach of trust with impunity. That is not the case. If there has been a breach of trust in this case, it cannot be committed with impunity, because there are ample means by which that can be rectified. It was quite open to the plaintiff in this case, in a suit properly constituted, to have alleged the insufficiency of this security either with or without an alleged breach of trust, and the refusal of his co-trustee to call in the security and to see that the moneys were placed out in proper investments. It was open to him to have filed a bill for that purpose. But if the bill so filed had contained such allegations as are contained in the bill before us, and are to be found in the affidavit of the plaintiff himself, and have been admitted in the course of the argument, any breach of trust committed must have been a joint breach of trust, and immediately following a decree for carrying the trusts of the will into execution there must have been a direction for realization of the securities against the two trustees, and an order against the two to make good the loss. I can quite under-

stand why the gentleman who framed this bill did not think it worth while to raise the question in that form. In the cases which have been referred to there was an actual receipt of the trust moneys by one of the two trustees, as in the case of *Baynard v. Woolley* ⁽¹⁾. Here there was a loan made to Arnold originally upon securities, which, whether they were or not of ample value, were within the trust for [21] *investment. Out of that sum of money no doubt a portion ultimately found its way to the other trustee, who was a vendor. But that is a distinct and different case from *Baynard v. Woolley* ⁽¹⁾. The other cases were suits by the trustees, or the *cestuis que trust*, or the representatives of the *cestuis que trust*, for the purpose of enforcing restoration from the trustees who had committed a breach of trust. It seems to me that we are not in any way running counter to the authorities in refusing this appeal. The bill is of a novel character, and it appears to me that it is entirely misconceived.

THESIGER, L.J.: I also think that the bill is misconceived. The plaintiff cannot put his case as regards the facts higher than this, that he and the defendant, being co-trustees, have advanced trust funds upon a security authorized by the instrument creating the trust, but which either was at the time when it was taken, or has since proved to be, inadequate to secure the fund advanced; and that the defendant has, more or less directly, by virtue of that advance, having certain business transactions with the person to whom the money was paid, derived a benefit, the plaintiff, although perhaps not aware to the full extent what that benefit was, yet, at all events, being aware that some benefit was derived by his co-trustee.

Those being the facts, I cannot see any ground either of principle or authority upon which this bill can be supported. Several cases have been cited by Mr. Hinde Palmer on behalf of the plaintiff, but when those cases are looked at they seem to be clearly distinguishable. All of them, with the exception of *Fuller v. Knight* ⁽²⁾, were cases in which the plaintiff and defendant being co-trustees had misappropriated a portion of the trust funds, and either the trust property itself or the proceeds of that trust property had found their way into the hands of the defendant. Under those circumstances a clear equity arose enabling the plaintiff to recover either the trust property or the proceeds of that trust property from his defaulting co-trustee. The case of *Fuller v. Knight* was a little different, but is equally dis-

⁽¹⁾ 20 Beav., 583.

⁽²⁾ 6 Beav., 205.

tinguishable *from the present case. There a trustee [122 had connived with a *cestui que trust*, being tenant for life, in the appropriation by the tenant for life of certain trust funds to which that tenant for life was not entitled. Subsequently certain funds belonging to the tenant for life had come into the hands of that trustee, and he claimed to hold those funds for the purpose of reinstating the fund which had been misappropriated, in other words, putting an end to the breach of trust which had been committed. The tenant for life having executed a creditors' deed, the trustees of that creditors' deed filed a bill in order, if possible, to obtain from the trustee payment of the funds of the tenant for life which he held for the purpose I have stated; but their bill failed. The mere statement of the facts of that case shows how totally distinct it is from the present.

Those being the only authorities which are cited on behalf of the plaintiff in support of this bill, what ground is there upon which it can be supported? I can see none. The only one suggested is that because the defendant has in respect of this advance, upon a security authorized by the will by which the trust was constituted, obtained a benefit, therefore the plaintiff, who has never been called upon yet to make good any loss of trust funds, is entitled to be indemnified by his co-trustee. I cannot find any principle upon which that contention can be supported.

Solicitors for plaintiff: *Randall & Angier*, agents for J. M. Head, Reigate.

Solicitors for defendant: *Saffery & Huntley*.

See 22 Eng. Rep., 300 note; *ante*, p. 165 note.

[7 Chancery Division, 123.]

C.A., Nov. 22, 1877.

**Ex parte* CROSBIE. *In re* BEDELL. [123

Proof—Debt contracted after Notice of Act of Bankruptcy available for Adjudication—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 31.

The expression "notice of any act of bankruptcy available for adjudication" used in sect. 31 of the Bankruptcy Act, 1869, means notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered.

Therefore a creditor who contracted a debt with a bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of the petition upon which the adjudication is made, is not precluded by sect. 31 from proving under the adjudication.

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[7 Chancery Division, 127.]

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127] **Ex parte* STEPHENS. *In re* LAVIES.*Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23—Disclaimer of Lease by Trustee—Right to remove Fixtures.*

After the trustee in a bankruptcy has executed a disclaimer of a lease vested in the bankrupt, he is not entitled, even though he be in possession of the leasehold premises, to remove the tenant's fixtures.

The effect of the disclaimer is to give the landlord an absolute title to the fixtures as from the date of the order of adjudication.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, acting as Chief Judge in Bankruptcy.

By an indenture dated the 28th of September, 1871, J. F. Williams demised to W. H. De Carteret and Joseph Lavies, their executors, administrators, and assigns, a messuage and premises known as No. 71 Jermyn Street, together with the fixtures then in, upon, or belonging to the demised premises, for the term of 30½ years, from the 29th of September, 1871, at a rent commencing with £416, and ultimately increasing up to £1,400. The interest of De Carteret under the lease afterwards became vested in Lavies, and he carried on upon the premises a club called the Universities and New Athenæum Club. In January, 1876, he filed a liquidation petition. The creditors resolved upon a liquidation by arrangement, and appointed James Waddell trustee. He continued for some time to carry on the business, but ultimately, finding it unprofitable, he in March, 1877, applied to the court for leave to disclaim the lease. The executors of the landlord (who was then dead) were served with notice of the application, and on the 15th of March an order was made that the trustee should be at liberty to disclaim. On the 22d of March he executed a disclaimer in writing, whereby he gave notice to the executors that, in pursuance of the order of the 15th of March, he thereby disclaimed "all right, title, and interest which, as such trustee as aforesaid, I may have or be entitled to" under the lease. Before this the furniture and tenant's fixtures on the demised premises had by the trustee's direction been advertised for sale by auction on the 13th of March. On the [28] 10th of March the executors gave notice *to the trustee that they claimed the fixtures, and he on the 12th of March gave an undertaking to withdraw them from the sale, and they were accordingly not sold. On the 23d of March the trustee, being still in possession of the premises, caused

the tenant's fixtures to be severed and removed from the premises. The executors thereupon applied to the court for an order declaring that the fixtures thus removed were the property of the executors, and that they had been wrongfully removed, and for an order that the trustee should deliver up the articles removed or pay their value to the executors, and pay damages for the injury done to the freehold in the removal. The Registrar held that the executors were entitled only to such (if any) of the removed articles as were landlord's fixtures (as to which an inquiry was directed), and with that exception he refused the application. The executors appealed.

Winslow, Q.C., and *J. Linklater*, for the appellants: By virtue of sect. 23 of the Bankruptcy Act, 1869, the disclaimer of a lease by the trustee operates as a surrender of the lease on the day of the date of the order of adjudication, or, in the case of a liquidation, the date of the trustee's appointment. Therefore, as soon as the disclaimer was executed, the trustee became a mere trespasser on the property, and a trespasser as from the date of his appointment. It is well settled that a tenant must exercise his right to remove fixtures during his term, or during such time after its expiration as he can be considered to be still in possession of the property as tenant. After that he has no right to remove them: *Lyde v. Russell* ('); *Minshall v. Lloyd* ('); *Weeton v. Woodcock* ('); *Pugh v. Arton* ('); *Storer v. Hunter* ('). In *Stansfeld v. Corporation of Portsmouth* ('), the decision turned upon the special language of the contract. In the *London and Westminster Loan and Discount Company v. Drake* ('), and in *Saint v. Pilley* ('), though it was held that a tenant who had mortgaged fixtures could not, *by a [129 voluntary surrender of his term, defeat the rights of his mortgagee, yet the general principle is recognized that the tenant cannot remove the fixtures after the expiration of the term. Upon the execution of the disclaimer by the trustee the landlord's title was complete: *Ex parte Dillon* ('). The terms of the disclaimer are as wide as they well could be.

Finlay Knight, for the trustee: The executors had notice of the application for leave to disclaim; they might then have asked that immediate possession of the property should be given to them. They did not, and they said nothing about the fixtures.

(') 1 B. & Ad., 394.

(') 2 M. & W., 450.

(') 7 M. & W., 14.

(') Law Rep., 8 Eq., 626.

(') 3 B. & C., 368.

(') 4 C. B. (N.S.), 120.

(') 6 C. B. (N.S.), 798, 810.

(') Law Rep., 10 Ex., 187; 12 Eng. Rep., 577.

(') 3 Ch. D., 459.

By sect. 23 the disclaimer operates as a surrender of the lease as from the date of the order of adjudication, i.e., before the appointment of the trustee, or, in liquidation, as from his appointment. If the appellants are right in their contention, the result would be that, if the trustee had in any way dealt with the fixtures, he could not afterwards disclaim the lease, but must take to it, however onerous the covenants. The intention of the act would thus be defeated. The trustee was lawfully in possession until he disclaimed; he was not, therefore, a mere trespasser.

[JAMES, L.J.: He became so after the disclaimer.]

Penton v. Robart (') shows that a tenant who is in possession after the expiration of his term is entitled to remove fixtures. and in *Elwes v. Maw* (') the exception in favor of trade fixtures, from the general rule that everything annexed to the freehold is the property of the landlord, is fully recognized. The tenant has a right to remove the fixtures during his term, or, as Parke, B., said in *Macintosh v. Trotter* ('), "during what may, for this purpose, be considered as an excrescence on the term." In *Minshall v. Lloyd* (') the landlord had taken possession before the seizure by the execution creditor, and the question arose between the sheriff and some assigns of the lessee, and the judgment of Parke, B., shows that the tenant's right extends beyond the mere term, for he says that "the steam [30] engines were left affixed to the freehold *after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants." In *Weeton v. Woodcock* (') the jury found that the tenant had not removed the fixtures within a reasonable time after the landlord's entry for a forfeiture. In *Pugh v. Arton* (') the landlord had put a man into possession of the premises who had been forcibly ejected. The *London and Westminster Loan and Discount Company v. Drake* (') shows that the tenant has an assignable interest in the fixtures, which he cannot defeat by surrendering the term, and Williams, J., who delivered the judgment of the court, said ('): "It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant." The possession of a trustee in bankruptcy is something of this nature.

(¹) 2 East, 88.

(²) 3 East, 88.

(³) 3 M. & W., 184.

(⁴) 2 M. & W., 450.

(⁵) 7 M. & W., 14.

(⁶) Law Rep., 3 Eq., 626.

(⁷) 6 C. B. (N.S.), 798.

(⁸) 6 C. B. (N.S.), 810.

JAMES, L.J.: I am of opinion that we must accede to Mr. Winslow's argument. The law is clearly settled that the right of a tenant to fixtures is a qualified right. It is a right to have the fixtures if he removes them during his term, or during a certain time after its expiration, something which may be called an enlargement of the term, or, to use the words of Baron Parke, an excrescence on the term, during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord. In the present case the actual lessee himself did not remove the fixtures at all. By the joint operation of the trustee's disclaimer and the provisions of the Bankruptcy Act, the term is to be deemed for all purposes to have come to an end on the day of the adjudication, or, what is equivalent in the case of a liquidation by arrangement, the day of the appointment of the trustee. That is what the act says. A removal of the fixtures months afterwards cannot be said to be a removal during the term or within a reasonable time after its expiration. The execution of the disclaimer by the trustee made him a mere stranger. He had the legal right to remain in possession of the premises for the purpose of exercising his judgment whether he would or would not disclaim the lease. He was in possession for that purpose, and that only; that is the sole extent to which the statute gave him any right to retain possession. When he did disclaim the lease, the term was at once gone as from the date of his appointment. I know of no principle or authority for saying that a surrender can have any operation except upon the whole estate or interest derived under the lease. It is singular that none of the reported cases relate to an actual surrender, but I doubt whether the tenant could in any way whatever interfere with or limit the right of the landlord. It is not, however, necessary to determine this. I am of opinion that in the present case the disclaimer operated as a surrender of every interest of the tenant under the lease, and the order of the Registrar must be varied accordingly.

BAGGALLAY, L.J.: I am entirely of the same opinion. The act permits the trustee to take time to consider whether he will or will not disclaim leasehold property of the bankrupt. But, if he does disclaim, the lease is to be deemed to have been surrendered on the day of the adjudication. As the Lord Justice has pointed out, if the lease had been put an end to then no estate would have remained in the trustee, and the act says that the disclaimer is to operate notwithstanding that the trustee has endeavored to sell, or has taken

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possession of the property, or has exercised any act of ownership in relation thereto.

THESIGER, L.J.: I am of the same opinion. Apart from the action of the trustee himself the interest of the bankrupt in the lease would have vested in him with all the rights incident to it. Sect. 23 says that the trustee may disclaim a lease, and that the effect of his doing so is that the disclaimer relates back to the adjudication. It does not operate to divest any estate which may be in the trustee, but to place him in the position of never having had any estate at all. If the trustee does disclaim so as to escape the burdens imposed by the lease, it is impossible to hold [32] that he can retain *rights, which, whatever may be the exact principle on which they are founded, do certainly spring out of the term.

Solicitors for executors: *Cowdell, Grundy & Browne.*

Solicitors for trustee: *Lewis & Lewis.*

See 12 Eng. Rep., 582 note; 20 Eng. Rep., 728 note; 20 Eng. Rep., 29 note.

The weight of authority is, that a tenant may remove trade fixtures which he might have removed during the term, if he remains in lawful possession after the end of the term, holding possession of the premises under a right still to consider himself a tenant: *Pronguey v. Gurney*, 36 U. C. Q. B., 53.

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements, held to be trade fixtures as between landlord and tenant, and removable by the tenant.

Held, also, that neither the increase nor reduction of the rent in this case, under the circumstances stated, operated as a surrender of the term and an acceptance of the new tenancy, so as to prevent the tenants from claiming the fixtures: *Pronguey v. Gurney*, 36 U. C. Q. B., 347.

The plaintiff owned lot 11 on Seaton street, in the city of Toronto, and defendant lot 10 adjoining. There was a house situate partly on each lot, and it appeared that the plaintiff and one A., under whom defendant claimed, had mutually agreed that A. should occupy a part of the house which, owing to the position of the partition walls, encroached slightly on lot 11. A. so occupied until her death, and her heirs until they conveyed to defendant.

Held, that defendant must be regarded either as tenant at will to, or as occupying under a license from the plaintiff, and could not be ejected without notice or a revocation of the license; and that in either case he would be entitled to a reasonable time to remove what he might have in the house: *Keys v. Guy*, 36 U. C. Q. B., 356.

Where a tenant was in possession under a lease which contained a clause in these words: "the said Julien G. B. Handbine is to have the privilege of removing at the end of said term all improvements placed by him on the said premises, only on condition, however, that the conditions of this lease are fully complied with," and allowed one quarter's rent, which by the terms of said lease was required to be paid quarterly in advance, to be in arrears for thirteen days when the same was tendered and refused.

Held, that equity would not enforce a forfeiture of the right to remove such improvements: *Estabrook v. Hughes*, 8 Neb., 496.

By the terms of a lease, the lessee, aside from the rent reserved, covenanted to pay all taxes and assessments levied and assessed during the term. In case of a failure to perform any of the covenants, the lessor was entitled to re-enter. In case the lessee built permanent buildings on the premises during the term, and performed all the

covenants on his part, it was covenanted that the lessor should, at his option, at the expiration of the term, either give a new lease for a further term, or pay to the lessee the value of the buildings; the rent of the new term and the value of the buildings to be ascertained by two appraisers, one to be nominated by each party, the nominations to be made not more than one year, and at least five months before the expiration of the term. Upon a nomination made by one, in default of a nomination by the other within one month thereafter, the person nominated was authorized to appoint his associate. The lessee erected a building on the premises. The lease expired May 1st, 1867. The lessee failed to pay the taxes for the year 1866. Within the time prescribed by the lease he gave notice to the lessor of the nomination of an appraiser, and the lessor nominated one on his part. The appraisers met and determined the value of the building. At the time of the appointment of appraisers the lessor had no knowledge that the taxes were unpaid; he declined to give a new lease, took possession at the end of the term, and refused to pay the appraised value of the building. In an action to recover the same, held that the action was not maintainable; that the payment of the taxes was a condition precedent, the performance of which, in the absence of evidence showing a valid excuse for non-performance, was essential to fix the liability of the lessor; that the appointment of and submission to the appraisers and the appraisal did not, under the circumstances, affect the rights of the parties; that it was not a waiver of performance of the covenant, nor did it estop the lessor from claiming non-performance: 1st. Because at the time there was no default, the lessee having the whole of the term in which to perform. 2d. Because of ignorance on the part of the lessor that the taxes remained unpaid.

Also held, that there was no ground under the complaint and evidence upon which a court of equity should interfere to relieve the lessee from the consequences of his failure to perform: *People's Bank v. Mitchell*, 73 N. Y., 406.

Where a tenant at will occupies a house of his own on the land of another

and does not remove it within a reasonable time after his tenancy terminates, and after notice and request to do so, the owner of the land will not be a trespasser for entering and taking possession of the house: *Sullivan v. Carberry*, 67 Maine, 531.

Where a landlord leased a farm for five years, if not sold, reserving an annual rent, payable in two equal payments during each year, and the lease provided that if the landlord sold the premises to any third party, he should pay reasonable damages to the tenant who was to give possession to plow, and haul manure, etc., as soon as his crops were gathered; it was held, that two modes were provided for terminating the term—by lapse of time, and by sale of the premises by the landlord to a third person, and that the "reasonable damages" he was to pay in the latter event meant in case the tenancy was terminated before the end of any one year, and also that when it was so terminated at the end of a year the tenant was not entitled to recover any damages whatever: *Taylor v. Frohock*, 85 Ills., 584.

A tenant who substitutes some fixtures for others, still serviceable, belonging to the landlord, cannot remove them at the expiration of the lease without accounting to the landlord for those which he removed.

The right of the tenant to remove fixtures is not lost by non-payment of rent and notice to quit, but only by quitting. If the landlord has prevented the removal by an attachment of the fixtures, the right is not lost even by leaving the premises.

A parol renewal of a lease renews whatever rights the tenant had to remove the fixtures: *Ex parte Hemenway*, 2 Lowell, 496.

Where a lease contained a covenant on the part of the lessor for a renewal of the term, or in default, payment of improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel a specific performance of the contract to renew: *Hutchinson v. Boulton*, 3 Grant's Chy., 391.

Where a covenant was contained in a lease that the lessee should erect a building on the demised premises during the term; "provided always, and it is the true intent and meaning of these

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presents and the parties thereunto, that at the expiration of the demise, the buildings erected shall be paid for at the valuation of two indifferent persons, under oath, one to be chosen by each party, etc.:" Held, on a plea of

non est factum, pleaded to a declaration treating the part of the lease commencing "provided always" as a covenant that the plaintiff was entitled to recover: *McFattridge v. Talbert*, 2 U. C. Q. B., 156.

[7 Chancery Division, 132.]

M.R., June 30: C.A., Nov. 26, 1877.

In re PERCY & KELLY NICKEL, COBALT AND CHROME IRON MINING COMPANY.

JENNER'S CASE.

Company—Winding-up—Director—Qualification—Condition Precedent.

The articles of a limited company, after naming the original directors, gave to the directors for the time being power to appoint new directors at any time before the first general meeting. It was then provided that no person should be qualified to be a director who was not a holder of shares in the company of the nominal value of £500, and that no person except the original directors, and such person as might be appointed by them, should be qualified to be a director who had not been a holder in his own right of such shares for at least six months.

J. was appointed a director by the original directors, and attended several meetings of the board, but never applied for or acquired any shares, and when the company was wound up his name was not on the register of shareholders:

Held (affirming the decision of the Master of the Rolls), that the holding of the necessary number of shares was a condition precedent to the election of a director, and that J.'s election was therefore void; that his acting as director was no evidence of a contract to take the shares; and that his name could not be placed on the list of contributories.

Hamley's Case (1) approved.

THIS was an application by the official liquidator of the Percy & Kelly Nickel, Cobalt and Chrome Iron Mining Company, Limited, which was in liquidation, to put the name of the Right Rev. H. L. Jenner, late Bishop of Dunedin, in New Zealand, on the list of contributories in respect of fifty shares of £10 each.

The company was registered on the 1st of October, 1875, with a nominal capital of £120,000 in shares of £10 each.

The articles provided that the directors should be not less than five nor more than eleven, and named six directors who were to hold office till the first general meeting of the company in 1880.

133] *By Art. 99 it was provided "that the directors for the time being shall have power to appoint any other person or persons to be a director or directors at any time before the first general meeting to be held in the year 1880."

Art. 100 was as follows: "No person shall be qualified to be a director who is not a holder of shares or stock in the

(1) 5 Ch. D., 705; 22 Eng. Rep., 410.

company of the nominal value of £500, and no person except the original directors and such person as may be appointed by them under the last clause shall be qualified to be a director who has not been the holder in his own right of such shares or stock at least six months."

Bishop Jenner was elected a director by the original directors at their first meeting in October, 1875. He afterwards attended six meetings of the board and took an active part in the proceedings, and his name appeared in the prospectus of the company as a director. But he never applied for any shares, nor were any allotted to him, and his name did not appear on the register of shareholders when the company was ordered to be wound up.

Under these circumstances the Chief Clerk refused to settle his name on the list of contributories, and the official liquidator accordingly applied to have his name placed on the list for fifty shares, being his qualification as a director.

The case was heard before the Master of the Rolls on the 30th of June, 1877.

Chitty, Q.C., and *H. M. R. Pope*, for the appellant.

Kenyon Parker, for Bishop Jenner, relied on *Hamley's Case* (').

JESSEL, M.R.: I think this case is really the same as *Hamley's Case*. It is simply a question of construction. If the qualification is required to be held by the director before the election, and he does not hold it, then, as I understand the question, the election is void. If the qualification may be acquired afterwards, and the director has a reasonable time for acquiring it, different considerations arise.

Now, the first point to be considered is, what is the meaning of *the words in the 100th clause of the articles. [134 [His Lordship read the clause.] Now, as to the six months mentioned in the latter part of the clause, the six months must run from some time or other, and the only possible meaning I can give to the words, which I did give to them in *Hamley's Case* ('), was the six months preceding the election. If that is the meaning of the latter part of the clause, the first part of the clause must refer to the time of the election, and we consequently have an express direction that the man shall be a holder of shares at the time of election, if he is to be nominated one of the directors.

If that be so, all that I said in *Hamley's Case* applies here; and it appears to me that what was said by the Court of Appeal in *Brown's Case* (') also applies. The Lord Chan-

(') 5 Ch. D., 705; 22 Eng. Rep., 410.

(') Law Rep., 9 Ch., 102, 109; 8 Eng. Rep., 762, 768.

cellor (Lord Selborne) says there that the mere acceptance of the office of a director by a person who is not the holder of the necessary number of shares does not import an implied contract that he will take the shares. And Lord Justice Mellish said this, "If the meaning of the articles of association was that a person must have the shares before he is qualified to be a director, the consequence would be that the election of Mr. Brown as a director would be wholly void." Then he goes on to say that the words of the clause before him admitted of the qualification being obtained within a reasonable time afterwards. It follows, therefore, from what I have said, that the election of Bishop Jenner was void, and that there is no implied contract on his part, his name not being on the register, to take the shares, so as to make him a contributory to this company.

From this decision the official liquidator appealed. The appeal was heard on the 28th of November, 1877.

Chitty, Q.C., and *H. M. R. Pope*, for the appellant: This case is distinguishable from *Hamley's Case*, inasmuch as Hamley, although appointed by the directors, was not appointed by the original directors named in the articles, and therefore it might be considered that it was necessary that he should have held fifty shares for six months before his [35] election. But no such *restriction applied to the election of Bishop Jenner, who was appointed by the original directors at their first meeting.

We contend, in the first place, that upon the true construction of the articles the possession of a qualification was not a condition precedent to the election of Bishop Jenner, but that he had a reasonable time to acquire the qualification; and that there was an implied contract with the company that he would take the necessary number of shares. In the second place, we say that by acting and holding himself out as a director he is estopped from now saying that he had no qualification. The fact of his not being on the register as a shareholder makes no difference; for if a person ought to have been placed on the register the court has the power to correct the register and insert his name. The authorities are not always consistent, but the result of them is distinctly in our favor: *Currie's Case* (1); *Stock's Case* (2); *Tothill's Case* (3); *Leeke's Case* (4); *Lord Claud Hamilton's Case* (5); *Brown's Case* (6); *Kincaid's Case* (7); *Har-*

(1) 3 D. J. & S., 367.

(2) 4 D. J. & S., 426.

(3) Law Rep., 1 Ch., 85.

(4) Law Rep., 6 Ch., 469.

(5) Law Rep., 8 Ch., 548.

(6) Law Rep., 9 Ch., 102; 8 Eng. Rep., 762.

(7) Law Rep., 11 Eq., 192.

ward's Case ('); *Green's Case* ('); *Forbes' Case* ('); *Karuth's Case* ('); *Carling's Case* ('); *Stephenson's Case* ('); *Fowler's Case* ('); *Portal v. Emmens* ('); *Miller's Case* ('); *Barber's Case* ("); *De Ruigne's Case* ("); *Lindley on Partnership* ("); *Buckley on the Companies Acts* (").

Kenyon Parker, for Bishop Jenner, was not called on.

JAMES, L.J.: I think that it is impossible to say that the Master of the Rolls has come to an erroneous conclusion in this case. I regret that it is impossible to deal with the long string of cases which have been *cited in such a way [136 as to prevent their being cited again in future cases. They always have been cited, and I suppose always will be in these directors' cases. The court, however, can only deal with the particular facts before it. It is sufficient to say that in my opinion it is governed by *Hamley's Case* (") and *Barber's Case* ("). The only real question is whether the articles of association made the possession of a qualification a condition precedent to the election of a director. The 100th clause says, "No person shall be qualified to be director who is not the holder of shares or stock in the company of the nominal value of £500, and no person except the original directors and such person as may be appointed by them under the last clause shall be qualified to be a director who has not been the holder in his own right of such shares or stock at least six months." That must mean six months before the election; and that shows that the words in the former branch of the clause must mean that the person elected a director must hold the qualification at the time of his election. In one case no person can be elected who is not the holder of shares at the time; and in the other case no person who has not held them for six months before the time of election. The object of the distinction is obvious. The scheme of the clause is that only persons who have been shareholders for six months should be qualified to be directors; but the time is dispensed with in the case of the original directors, as to whom you could not get the period of six months, and in the case of those appointed by them, as to whom there would be the same difficulty. But the time only is dispensed with. It appears, therefore, to me that

(1) Law Rep., 13 Eq., 30.

(2) Law Rep., 18 Eq., 428; 10 Eng. Rep., 748.

(3) Law Rep., 19 Eq., 353; 12 Eng. Rep., 846.

(4) Law Rep., 20 Eq., 506.

(5) 1 Ch. D., 115; 15 Eng. Rep., 676.

(6) 45 L. J. (Ch.), 488.

(7) Law Rep., 14 Eq., 316.

(8) 1 C. P. D., 664.

(9) 5 Ch. D., 70.

(10) 5 Ch. D., 963; 22 Eng. Rep., 576.

(11) 5 Ch. D., 306; 22 Eng. Rep., 107.

(12) 3d ed., p. 1419.

(13) 2d ed., p. 46.

(14) 5 Ch. D., 705; 22 Eng. Rep., 410.

the qualification was a condition precedent, and that Bishop Jenner's election was void on the principle of *Barber's Case*. The Bishop's name was not on the register, and I cannot see any evidence of a contract on his part to take shares in the company. I cannot help thinking that in some of the cases the court has been influenced by moral considerations, because strangers have been led to take shares by seeing the names of the persons elected as directors; and so the court has been induced to go too far. But such cases ought to be decided on general principles, and the court has to see whether there was really a contract by the company to [37] allot, and by the *Bishop to take shares. I can see no evidence of any such contract. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, L.J.: I am of the same opinion. An exhaustive list of cases has been cited, but in my opinion only two have any bearing upon the present case. For, according to the true construction of the 100th clause of the articles of association, the possession of the requisite number of shares at the time of the election was necessary, and if they were not possessed at that time, the person elected did not become a director. That was so decided in *Barber's Case* (*), and also by the Master of the Rolls in *Hamley's Case* (*). And when once you have arrived at the conclusion that, on the true construction of the articles, the possession of a qualification was a condition precedent to the election, there could be only one result, namely, that Bishop Jenner was not a director.

THESIGER, L.J.: I am also of the same opinion. The principle on which the court must decide was laid down in *Barber's Case*, and the only question is whether the present case comes within it. I agree with Lord Justice James in his construction of the 100th clause in the articles, and am consequently of opinion that Bishop Jenner was not duly elected a director.

Solicitors: *Barnard & Co.; F. W. Snell.*

(*) 5 Ch. D., 963; 22 Eng. Rep., 576.

(*) 5 Ch. D., 705; 22 Eng. Rep., 410.

See 15 Eng. Rep., 18 note; 22 Eng. Rep., 418 note.

[7 Chancery Division, 138.]

C.A., Nov. 29, 1877.

**Ex parte WILLIAMS. In re THOMPSON.* [138]

Fraud on Bankruptcy Law—Proviso for Increase of Security in event of Mortgagor's Bankruptcy—Mortgage—Attornment Clause—Sham Rent—Distress—Bankruptcy of Mortgagor—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 34—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36).

A mortgage of smelting works to secure the repayment of an advance of £55,000, contained, in addition to the ordinary clauses, a covenant by the mortgagee that, if the interest was punctually paid as it became due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagor should not have become bankrupt or have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of the mortgaged property, and should not have ceased to carry on his business thereon, then the mortgagee would not for a period of five years require payment of the principal. And the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged property at the yearly rent of £20,000, to be paid half-yearly on the days on which the interest on the mortgage debt was made payable. The deed was not registered under the Bills of Sale Act. It was admitted that the letting value of the property was not more than £3,000 per annum. Four months after the execution of the mortgage the mortgagor filed a liquidation petition, and the mortgagee afterwards claimed the right to distrain the chattels upon the mortgaged property for a year's rent under the attornment clause:

Held, that the arrangement was a mere device to give the mortgagee an additional security in the event of the mortgagor's bankruptcy, and was, therefore, in that event, void, as a fraud upon the bankrupt law, and that sect. 34 did not protect a distress levied for a mere sham rent.

The mortgagee was, therefore, restrained from levying a distress for the rent.

[7 Chancery Division, 145.]

C.A., Nov. 29, 1877.

**Ex parte EYSTON. In re THROCKMORTON.* [145]

Annuity—Forfeiture on Bankruptcy—Cease on doing or permitting any Act whereby the Annuity would be aliened.

A testator gave an annuity to his son, with a proviso that if he should "at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner whatsoever," the annuity should cease. The son neglected to comply with a debtor's summons, and was thereupon adjudicated a bankrupt:

Held, that the annuity ceased.

THIS was an appeal from a decision of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy.

Sir R. G. Throckmorton, by his will, dated the 1st of March, 1855, devised all his real estates to the use of trustees in fee, subject to the charges, powers, and provisions thereinafter contained, in trust for his first and other sons suc-

cessively in tail, with remainder in trust for all his daughters as tenants in common in tail, with cross remainders between and among them, with remainder in trust for his own right heirs: Provided always, and he declared that if at his death any son of his should become or be entitled to the real estate thereinbefore devised for an estate tail in possession under the trusts thereinbefore contained, then and in such case he gave and bequeathed and thereby charged such real estate with the payment of an annuity of £150 to each and every of his younger sons and daughters then living, payable thenceforth half-yearly during the respective lives of each and every such younger son, and during the respective lives of each and every of such daughters, if they should respectively so long remain unmarried, or until such younger sons or daughters respectively should have become entitled to the said real estate, or any share therein, for an estate tail in possession under the trusts thereinbefore contained: Provided always, and the testator declared that "if any son or daughter of mine vestedly or presumptively entitled to any such annuity shall at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be [146] aliened, charged, or incumbered in any manner *whatsoever, the said annuity to which such son or daughter of mine shall be so entitled shall thereupon absolutely cease, determine, and be void, and shall sink into the real estate hereby charged therewith for the benefit of the person or persons for the time being entitled to such real estate under the trusts hereinbefore contained."

The testator died in 1862. His son, Sir Nicholas Throckmorton thereupon became tenant in tail of the devised estates, and an annuity of £150 became payable to Richard Throckmorton, a younger son. In 1876 Richard was adjudicated a bankrupt, the act of bankruptcy being the failure to comply with a debtor's summons which had been served upon him by the petitioning creditor. On the application of the trustee in the bankruptcy the Registrar ordered that the annuity of £150 should, as from the commencement of the bankruptcy, be paid by the trustees of the will to the trustee in the bankruptcy. The trustees of the will appealed.

H. Matthews, Q.C., and Romer, for the appellants: The question is whether the words "do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner whatsoever," are large enough to include an alienation by operation of law. We say that they are.

In *Lear v. Leggatt* ⁽¹⁾ a gift by will of a life interest provided that, in case the tenant for life should charge or attempt to charge, affect, or incumber his life interest, such mortgage, sale, or other disposition or incumbrance should operate as a complete forfeiture, and it was held that the forfeiture did not take effect on bankruptcy. But there the words pointed only to voluntary alienation by the tenant for life. There is another class of cases, such as *Croft v. Lumley* ⁽²⁾, where it was held that a warrant of attorney to enter up judgment was not a breach of a covenant not to charge or incumber a lease; *Doe v. Carter* ⁽³⁾, where it was held that a covenant not to assign, transfer, make over, barter, exchange, or otherwise part with a lease, was not broken by the lessee giving a warrant of attorney to confess judgment under which the lease *was taken in execution [147 and sold; and *Doe v. Hawke* ⁽⁴⁾, which is to a similar effect. But in *Doe v. Carter* ⁽⁵⁾ it was held that if the warrant of attorney was given for the express purpose of enabling the creditor to seize the lease, there would be a forfeiture. Another class of cases is where the donee of property originated a chain of legal proceedings which ended in an alienation of the property—where he, so to speak, set the ball rolling—such as *Shee v. Hale* ⁽⁶⁾, *Rochford v. Hackman* ⁽⁷⁾, *Martin v. Margham* ⁽⁸⁾, *Brandon v. Aston* ⁽⁹⁾, and *Churchill v. Marks* ⁽¹⁰⁾, which were cases of filing a petition under the Insolvent Debtors Act; *In re Amherst's Trusts* ⁽¹¹⁾, which was the case of filing a liquidation petition under the Bankruptcy Act, 1869; and *Davis v. Eytton* ⁽¹²⁾, where a lease was to be forfeited in case the lessee contracted a debt on which judgment was obtained followed by execution. These cases all point to a personal act done by the donee of the estate. There are other cases where there was not a personal act by the donee, such as *Domett v. Bedford* ⁽¹³⁾, where an annuity was to cease if the donee should alienate it, and it was held that upon an assignment of the annuity by the commissioners after his bankruptcy the annuity ceased; and *Cooper v. Wyatt* ⁽¹⁴⁾, where it was held that bankruptcy worked a forfeiture of an annuity which was to cease if the donee should sell, dispose of, or incumber it.

The cases most like the present are those in which a for-

⁽¹⁾ 1 Russ. & My., 690.

⁽²⁾ 6 H. L. C., 672.

⁽³⁾ 8 T. R., 57.

⁽⁴⁾ 2 East, 481.

⁽⁵⁾ 8 T. R., 300.

⁽⁶⁾ 13 Ves., 404.

⁽⁷⁾ 9 Hare, 475.

⁽⁸⁾ 14 Sim., 280.

⁽⁹⁾ 2 Y. & C. Ch., 24.

⁽¹⁰⁾ 1 Coll., 441.

⁽¹¹⁾ Law Rep., 13 Eq., 464.

⁽¹²⁾ 7 Bing., 154.

⁽¹³⁾ 6 T. R., 684.

⁽¹⁴⁾ 5 Madd., 482.

feiture was to take place on doing, or suffering, some act, deed, or thing, such as *Hill v. Cowdery* ⁽¹⁾, where an assignment of chattels by way of mortgage provided that the assignor should remain in possession until default in payment after demand, and contained a covenant by the assignor not to execute or suffer any act, deed, matter, or thing, by means of which the premises should be assigned, charged, or prejudicially affected, or whereby the mortgagee might be hindered from receiving, recovering, or taking possession of the same, and it was held that filing a declaration of insolvency ^[48] under sect. 70 of the Bankrupt Law Consolidation Act, 1849, was a breach of the covenant, *Roffey v. Bent* ⁽²⁾, where, the words being until he "shall do or suffer any act" whereby income should become payable to another person, it was held that the obtaining of a charging order by a judgment creditor worked a forfeiture; and *Montefiore v. Behrens* ⁽³⁾, which is a somewhat similar case. There is really no distinction between "to suffer" and "to permit"; "permit" has a passive as well as an active sense. Here the act of bankruptcy was the "neglecting" to comply with a debtor's summons, Bankruptcy Act, 1869, s. 6; the bankrupt allowed that to happen which he knew could only end in bankruptcy. "Permit" must refer to some legal proceeding; a man cannot in any other way permit another person to incumber his estate. "Permit" is used in contradistinction to "do"; it must therefore be used in its passive sense.

De Gex, Q.C., and *Pollard*, for the trustee in the bankruptcy: The cases relating to proceedings under the Insolvent Debtors Act do not apply; there was a great distinction between bankruptcy and insolvency; the one was compulsory, the other was voluntary. If the testator meant that there should be a forfeiture on bankruptcy he could have said so. Probably he intended that his son should be honest and pay his creditors. *Pym v. Lockyer* ⁽⁴⁾, *Churchill v. Marks* ⁽⁵⁾, and *In re Amherst's Trusts* ⁽⁶⁾, were cases of voluntary acts. In *Wilkinson v. Wilkinson* ⁽⁷⁾ it was held that bankruptcy did not cause a forfeiture. *Lear v. Leggatt* ⁽⁸⁾, *Croft v. Lumley* ⁽⁹⁾, and *Hill v. Cowdery* ⁽¹⁰⁾ are in our favor; *Cooper v. Wyatt* ⁽¹¹⁾ has been explained in more recent cases. In *Graham v. Lee* ⁽¹²⁾ it was held that filing

⁽¹⁾ 1 H. & N. 360.

⁽²⁾ Law Rep., 3 Eq., 759.

⁽³⁾ Law Rep., 1 Eq., 171.

⁽⁴⁾ 12 Sim., 394.

⁽⁵⁾ 1 Coll., 441.

⁽⁶⁾ Law Rep., 13 Eq., 464.

⁽⁷⁾ G. Coop., 259.

⁽⁸⁾ 1 Russ. & My., 690.

⁽⁹⁾ 6 H. L. C., 672.

⁽¹⁰⁾ 1 H. & N., 360.

⁽¹¹⁾ 5 Madd., 482.

⁽¹²⁾ 23 Beav., 388.

a voluntary declaration of insolvency, under which a fiat immediately issued, did not create a forfeiture. A man cannot be said to "permit" that which he cannot help: *Load v. Green* ('); *Ex parte Ford* ('); *Bosley v. Davies* ('); **Redgate v. Haynes* ('). "Permit" might perhaps [149 include not setting up a good defence to an action if the defendant had a good defence. "Permit" must be something voluntary. The neglect to comply with the debtor's summons is not the *causa causans* of the bankruptcy; the act of bankruptcy does not necessarily work a change of ownership of the debtor's property, and, moreover, the act of bankruptcy committed by failure to comply with a debtor's summons is available for adjudication to the summoning creditor only: Bankruptcy Act, 1869, s. 6.

Tyser v. Jones (') shows the difference between voluntary and compulsory alienation.

JAMES, L.J.: I am of opinion that the order of the learned Registrar cannot be sustained, but I do not feel any surprise whatever at his having arrived at the conclusion at which he did arrive, looking at the number of authorities and the nice distinctions apparently to be drawn between them. There is one authority, the case of *Roffey v. Bent* ('), before the late Lord Romilly, which is very nearly directly in point, in which the word "suffer" was used in contradistinction to the word "do." I am of opinion that there was good sense and good law in that decision, and I think it would be almost an absurd distinction to suppose that there is any difference between the words "suffer" and "permit." According to the dictionaries, "suffer" means "permit" and "permit" means "suffer." It would really be straining the meaning of the words too much to say that there is any substantial difference between "suffer" and "permit." Therefore we could not, I think, affirm the decision of the learned Registrar in this case without, in fact, overruling that decision of Lord Romilly.

But, independently of that, dealing with the thing as a matter of common sense, we must endeavor to ascertain what is the fair meaning of the words used by the testator. He has used very general words. He may have been advised to do so, and not to have a long string of words, followed by general words, the plain meaning of which is very often overridden by the preceding *particular words. [150 Then he has used these words: "If he shall do or permit

(') 15 M. & W., 216.

(') 1 Ch. D., 521, 528.

(') 1 Q. B. D., 84; 15 Eng R., 199.

(') 1 Q. B. D., 89.

(') 3 L. J. (Ch.), 241.

(') Law Rep., 3 Eq., 759.

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any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged, or incumbered." What is there in the ordinary fair meaning of the words, having regard to the thing he was dealing with—having regard to the cesser of the interest he had given to his son, what is there to which you could apply the word "permit" except legal proceedings, which a man does permit to such an extent as to cause an alienation of his property? I think that is the plain meaning of the words. If a man has been guilty of default he is a party to that default. If he has already squandered his money in contracting debts beyond his means—if he is thereby guilty of the default of not paying his debts, why then he is permitting to occur something whereby or by means whereof the property intended for him is aliened or gets into the possession of a stranger who is not intended to be benefited by the estate.

I think that is really the fair meaning of the words of the testator, and therefore this appeal must be allowed.

BAGGALLAY, L.J.: I am of the same opinion.

The word "permit" is clearly put by the testator in contradistinction to something done. I am unable to give any meaning to the word "permit" as so used in contradistinction to the word "do" if it is not applicable to such a case as we are now considering. The son is called upon to pay a debt, he stands by and does not pay it. The immediate consequence of his not paying it is that he commits an act of bankruptcy, by which act of bankruptcy, but for the provisions of the will, the annuity would be aliened. It seems to me impossible to say that he has not done or permitted an act or thing by means whereof the annuity is aliened.

THESIGER, L.J.: I am of the same opinion.

The meaning of the clause is no doubt open to some argument, but I think that we should be limiting the true force of the expressions used if we were to hold that the contention on the part of the respondent is good. I agree as to what has been said as to the collocation of the words "do" and "permit."

This observation also seems to me to arise, that, inasmuch as it is admitted that the word "permit" may be used in a passive as well as in an active sense, I cannot see any reason why in this particular will you should limit the use of the word to the one sense or the other.

Solicitors for trustees of will: *Ward, Mills & Co.*

Solicitors for trustee in bankruptcy: *Tidy, Herbert & Tidy.*

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See 2 Eng. R., 268 note; Matter of Parnham's Trusts, 2 Eng. R., 357; 7 Eng. R., 604 note; 13 Eng. R., 728 note; 13 Eng. R., 793 note.

A devise of the income from property to cease on the insolvency or bankruptcy of the devisee is good; and a limitation over to his wife and children upon the happening of such contingency is valid, and the entire estate passes to them; but if the devise be to him and his wife or children, or if he has in any way a vested interest thereunder, that interest, whatever it may be, may be separated from that of his wife or children and paid over to his assignee in bankruptcy. If the trustee has a *discretion* as to how much shall be paid or allowed to the *cestui que trust*, a creditor cannot call upon the trustee to exercise such discretion for his benefit: *Nichols v. Eaton*, 91 U. S. R., 716.

The jurisdiction of the court of chancery to reach the property of a judgment debtor held in trust for him, and apply it in satisfaction of a judgment at law, is defined and limited by the acts of 1845 and 1864 (Rev. p. 120, §§ 88-91). It does not extend to property held in trust for him or for his use, "where such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself."

These statutes should be liberally construed, so as to apply to such property as is enumerated in them, without regard to the means by which it came to the debtor—whether by gift, grant or devise—unless it be such property as is expressly excepted. Property reserved by law to the judgment debtor, and property and things in action held in trust for him, when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the debtor himself, are expressly excepted.

A legacy in the hands of an executor upon no other trust than to pay it over to the legatee, is not held in trust within the meaning of the exception in the statute. Such a legacy may be reached by a judgment creditor of the legatee, by proceedings under the statute.

But where a fund is given to executors, with directions to invest it and to pay to a legatee during his life the in-

terest and income thereof, at such times, in such manner, and in such amounts as the executors shall deem prudent, there is present the essential qualities of a trust—confidence, discretion, and active duties to be performed by the trustee—and the principal fund and the interest and income thereof are held in trust within the meaning of the exception in the statute. Neither the principal fund nor the accumulations of interest which the executors have kept back from the legatee for life, because they have not deemed it prudent to pay it over to him, can be reached in the court of chancery by a judgment creditor of the legatee for life, and be applied in payment of the judgment under the statute.

A testator gave to his executors the sum of \$250,000 in trust, to be kept safely invested, and to pay to his son the interest and income of such sum, at such times, in such manner, and in such amounts as his executors should deem most prudent, for and during his natural life, and upon his death leaving issue, then to hold the said sum of \$250,000 for the benefit of such issue, etc. Held, that the legatee for life was entitled to the whole interest and income derived from the investment, during his life, subject to a reasonable discretion on the part of the executors as to the times, manner and amounts of the payments.

That accumulations of interest which the executors had in hand, which they had not deemed it prudent to pay to the legatee for life, cannot be reached by his judgment creditors in satisfaction of their judgments, either at law by supplementary proceedings under the act concerning executions (Rev. p. 303), or in equity, under the statute above referred to: *Hardenbergh v. Blair*, 30 N. J. Eq., 645, reversing S. C., Id., p. 42.

Where a trust in property for the defendant has been created by, or the fund so held in trust has proceeded from some person other than the defendant himself, it cannot be reached and applied in payment of a judgment against the *cestui que trust*.

While the income derived from the money held in trust remains in the possession of the trustee, it is applicable solely and exclusively to the purposes of the trust, and it cannot be

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treated otherwise by the trustee, the *cestui que trust*, or his creditor.

The relation of trustee and *cestui que trust* must be terminated by the fulfillment thereof, and the money cease to be held in trust, and become absolutely and unqualifiedly the property of the judgment debtor by delivery to him, and the trustee discharged from all responsibility in regard to the same, before it shall be liable for the debts of the *cestui que trust*, the judgment debtor: *Parker v. Harrison*, 42 N. Y. Superior Ct. R., 150, citing *Campbell v. Foster*, 35 N. Y., 861.

A wife being desirous of devising her property so that her husband should have the benefit of it, but his creditors should not deprive him of her bounty, and having consulted an attorney in the matter, and at his suggestion having devised the property in absolute terms to the attorney and another, on an oral understanding that they should hold the same for her husband's use, and the facts being undisputed, and the attorney admitting the whole case and signifying his readiness to perform on his part, the trust was enforced in equity against the other devisee. The circumstance that the husband was the medium of the wife's communications with the attorney, and that the only positive and distinct evidence of her intent to bestow the property on her husband consists of his statements at the time, and of his testimony in the cause, is not an insuperable obstacle to the granting of relief, where many surrounding circumstances and facts that are undisputed corroborate, and none are in conflict with it.

It would be an abuse of confidence and a fraud for an attorney, under such circumstances, to decline to carry out the trust. The court would not allow him to do so, and as the other trustee claims under such confidence, he will be compelled to carry it out in the same manner as the attorney: *Hooker v. Axford*, 38 Mich., 454.

H. died seized of certain premises subject to a mortgage; he left a will by which he devised his estate, including said premises, to his executors in trust to divide the same into three parts: as to one part he provided as follows: "I direct my said trustees to permit and suffer my son, William B. Slocum, to have, receive and take the

rents, issues and profits thereof for the term of his natural life; and after his decease I give, devise and bequeath the same part or share to the heirs at law of my said son." Held, that the trust so attempted to be created was a passive one, and so was invalid; that the son took a life estate, upon which a judgment against him was a lien; that, therefore, the judgment creditor was a necessary party to an action to foreclose the mortgage; and he not having been made a party, that a purchaser on foreclosure sale was entitled to be released from his purchase: *Verdin v. Slocum*, 71 N. Y., 345, reversing 9 Hun, 150.

A trust estate cannot be created in property for the sole benefit of a male who is *sui juris*, and conveyed to a trustee for the purpose of protecting it from his creditors.

Where a testator bequeathed property in trust for the benefit of his son, without any limitation as to the extent of his interest in the same, but provided that he should be restricted in his expenses to the income thereof, and that said property should not be subject to his debts unless made by the written consent of the trustee:

Held, that after said son became of age, there being nothing for the trustee to do beyond that which was contrary to the policy of the law, the trust was executed and the beneficiary took an absolute fee simple estate therein: *Gray v. Obear*, 54 Georgia R., 231.

Surplus income, actually existing in the hands of trustees, although the trusts were created by, or the fund proceeded from, a third person, may be reached by a creditor's action against the beneficiary and his trustees (*Hann v. Van Voorhis*, 15 Abb. Pr., N.S., 79, and again in 5 Hun, 425; and *Miller v. Miller*, 7 Hun, 208, distinguished).

An evasive denial of the existence of a surplus will not suffice to prevent granting an injunction.

Nor will a general averment of the necessity of appropriating all the income, without specific details.

It seems that the rule (2 R. S., 174) protecting income from trusts created by, or funds proceeding from, third persons, against creditors' actions, does not apply against an action to enforce a judgment for alimony and the maintenance of the debtor's children.

If the complaint alleges that a surplus of income beyond what is necessary for the beneficiary, actually exists in the hands of the trustees, an evasive denial, e.g., a denial that there is a surplus to the amount alleged, and an averment there is no surplus, is insufficient: *Miller v. Miller*, 1 Abb. New Cases, 80.

A testator having bequeathed the sum of £500 per annum, payable out of the rents, income and profits of his real and personal estate indiscriminately, for the support of his widow and family (the widow having become sole executrix), her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate, against her as executrix, to be recouped for breaches of trust and the like: and *semble*, that where there is no form of legal proceeding or process whereby such a fund can be reached, this court has power under 22 Vic., ch. 22, sec. 288, to apply a remedy, as in this, by equitable attachment: *Bank of British N. A. v. Matthews*, 8 Grant's Chy. R., 486.

Where a testator gave certain estates to trustees, in trust as to the income for the separate use of his daughter and her children for her life, with di-

rections to pay the same to her, and in trust as to the capital after her death, to divide the same equally amongst her children: Held, that she was entitled during her life, for her separate use, to an equal share with each of her children; that the residue of the income was to be paid to her for their benefit; and that her own individual share was alone liable to her debts: *Crawford v. Calcutt*, 13 Grant's U. C. Chy., 71.

A provision in the constitution of a stock exchange board, whose members are limited in number, and elected by ballot, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted—the purchaser not becoming a member, nor having a right to transact business in the board until he shall be elected by ballot—is neither contrary to public policy, nor in violation of the bankrupt act. Membership of the board is not a matter of absolute sale. Although property, it is, when purchased, qualified and incumbered by conditions which the creators of it had the right to impose, and a compliance with which is necessary to obtain it: *Hyde v. Woods*, 94 U. S. R., 523.

[7 Chancery Division, 151.]

C.A., Nov. 30; Dec. 3, 1877.

MORRELL V. COWAN (*).

[1876 M. 292.]

Guarantee—Construction—Consideration—Past Debts.

The wife of a retail dealer who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you having at my request agreed to supply and furnish goods to C." (her husband), "I do hereby guarantee to you the sum of £500. This guarantee is to continue in force for the period of six years and no longer".

Held (reversing the decision of Fry, J.), that the guarantee was limited to goods actually supplied to the husband after it was given.

THIS was an appeal from a decision of Mr. Justice Fry (*).

The action was brought to enforce against the separate estate of the defendant Sarah Ann Cowan a guarantee given

(*) Reversing 22 Eng. Rep., 743.

(*) 6 Ch. D., 166; 22 Eng. R., 743.

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by her to the plaintiff, George Morrell, in order to obtain credit for her husband, the defendant M. M. Cowan.

The plaintiff was a leather factor at Leeds; the defendant M. M. Cowan was a boot and shoe manufacturer at the same place, who from time to time obtained goods from the plaintiff on credit. On the 24th of December, 1875, an acceptance of Cowan for £176 6s. 4d., which he had given to the plaintiff in payment for goods supplied, was dishonored. The plaintiff then refused to supply Cowan with any more goods on credit unless he would give security. Cowan's wife was entitled to considerable separate estate under the will of her [52] former husband. She was not restrained *from anticipation, and no settlement of the property had been made upon her marriage with Cowan. On the 22d of January, 1876, she gave the following guarantee to the plaintiff:—

“To Mr. George Morrell.

“Leeds, 22d January, 1876.

“In consideration of you the said George Morrell having at my request agreed to supply and furnish goods to M. M. Cowan, I hereby guarantee to you the said G. Morrell the sum of £500. This guarantee is to continue in force for the period of six years and no longer. As witness my hand this 22d January, 1876.

“(Signed)

Sarah Ann Cowan.”

After the 22d of January the plaintiff supplied Cowan with three parcels of goods to the value of £38 10s. 8d., but Cowan had paid for all of the goods except the third parcel, the value of which was £5 16s. at the time of the commencement of the action. On the 22d of July, 1876, the plaintiff recovered judgment in an action against Cowan for £385 4s. 4d. in respect of goods supplied before and after the date of the guarantee; and soon afterwards Cowan filed a liquidation petition. The plaintiff then commenced the present action against Mrs. Cowan on her guarantee. The facts are given in more detail in the previous report.

Mr. Justice Fry held that the guarantee was not limited to the price of goods supplied after it was given, but that it extended to any sums, to the amount of £500, which should be due to the plaintiff from Cowan within six years, although arising out of previous transactions. From this decision Mrs. Cowan and her husband appealed.

North, Q.C., and *Freeling*, for the appellants: The only reasonable construction of the guarantee is that it extends only to the price of goods supplied after its date, the sum of £500 being the measure of liability. Neither the agree-

ment to supply goods nor the previous liability of Cowan was the consideration for the guarantee, but the actual supply of the goods when it took place; and it would be absurd to say that for the supply of goods worth only £1 Mrs. Cowan intended to make herself liable for £500: *Wood v. Priestner* (1); *Westhead v. Sproson* (2); *Steel v. *Hoe* (3). We also contend that the document is void [153 under the Statute of Frauds, because the agreement is not to be performed within a year, and as the consideration is not duly set forth, there is no sufficient agreement in writing within the statute.

Cookson, Q.C., and J. Chester, for the plaintiff: The agreement to supply goods was a sufficient consideration for the guarantee. The mere words "I guarantee you £500" are nonsense without explanation. We must, therefore, look at the surrounding circumstances: *Heffield v. Meadows* (4); *Laurie v. Scholefield* (5); *Mason v. Pritchard* (6). It was of very great importance to Cowan and his wife that the plaintiff should continue to supply goods; his business entirely depended upon it, and it was not unreasonable that Mrs. Cowan should risk a large sum for that purpose. At all events, the subsequent supply of goods was a good consideration for the guarantee, and there being such, the amount of the consideration is unimportant: *Burgess v. Eve* (7); *Offord v. Davies* (8); *Johnston v. Nicholls* (9); *Boyd v. Moyle* (10). With respect to the objection based upon the Statute of Frauds, that statute has no application, as the agreement does not necessarily extend beyond a year: *Donnellan v. Read* (11); *Chitty on Contracts* (12).

JAMES, L.J.: I am compelled to come to a different conclusion from the learned judge in the court below. The question turns upon the construction of a very few words in a short document: the document is as follows: [His Lordship read the guarantee given by Mrs. Cowan.] Now, the first thing that is observable in reading this document is that the actual words of guarantee, "I do hereby guarantee to you, George Morrell, the sum of £500," are without meaning. Standing alone they would have no legal operation. By whom was the £500 to be paid? by her husband or by what *other person? Therefore, in order to [154

(1) Law Rep., 2 Ex., 66, 282.

(2) 6 H. & N., 728.

(3) 14 Q. B., 481.

(4) Law Rep., 4 C. P., 595.

(5) Law Rep., 4 C. P., 622.

(6) 12 East, 227.

(7) Law Rep., 13 Eq., 450; 2 Eng. R., 379.

(8) 12 C. B. (N.S.), 748.

(9) 1 C. B., 251.

(10) 2 C. B., 644.

(11) 3 B. & Ad., 899.

(12) Page 71.

ascertain the meaning of this guarantee, we must refer to the previous words of the document. You cannot attach any meaning to the guarantee without introducing the words which express the consideration. These words are as follows: "In consideration of you, George Morrell, having at my request agreed to supply and furnish goods to M. M. Cowan, I do hereby guarantee," &c. What does that mean? Surely it means, "If you will supply goods to my husband, I will guarantee the payment for the goods which you supply to the amount of £500." It is impossible, in my opinion, to read it otherwise. It is, of course, open to a married woman to make such an agreement as that contended for by the appellants, namely, that in consideration of the supply of a small amount of goods to her husband, she would guarantee the payment of his debts then due; but such an agreement must be expressed in clear and unambiguous terms. It is not sufficient to use such words as these: "I agree to guarantee you the sum of £500."

Mr. Justice Fry considered that he was bound to look at the surrounding circumstances, and he specially referred to an acceptance for £176 which had been dishonored. But I do not agree that that acceptance was such a surrounding circumstance as the court can look at. The only circumstances which really bear upon the guarantee are the applications by Cowan to Morrell to supply goods, and his refusal to supply any more goods unless he could give security. I rest my decision on the reasonable construction of the guarantee, and give no opinion on the question raised respecting the Statute of Frauds, although I think it is a question that deserved attention.

BAGGALLAY, L.J.: I am of the same opinion. We are called upon to construe the agreement for a guarantee dated the 22d of January, 1876. We can have no regard to any parol agreement between the parties, but the court is entitled to look at the position of the parties at the time. What, then, was that position? Morrell was a leather factor, and Cowan was a shoe manufacturer, and was indebted to Morrell for goods supplied in the course of his trade. Mrs. Cowan was possessed of separate estate, and when Cowan applied for a further supply of goods Morrell [55] refused to supply them, but was *willing to do so on receiving a guarantee from Mrs. Cowan. What, then, is the construction of this guarantee? I agree that the guarantee itself is expressed in words which have no meaning, and we must get at the interpretation of those words from the other parts of the agreement. Now, when we look at

the document we find that the expressed consideration is really no consideration at all: the agreement to supply goods at Mrs. Cowan's request was no consideration, for there was no obligation on the part of the plaintiff to supply any goods. But when the request was complied with, and the goods were actually supplied, then a consideration arose. No question could arise between the parties till the goods were actually supplied. When, therefore, we look at the whole instrument, we see that it is a guarantee for goods supplied to Cowan, and this is borne out by the clause that the guarantee is to continue in force for six years. Mrs. Cowan says in effect, "If you will continue to supply goods for six years, I will so long continue this guarantee." But it is suggested that the agreement had another meaning, namely, that although Mrs. Cowan was at that time under no liability to pay any of her husband's debts, yet she undertook this liability, that, in consideration of a supply of goods, which might be very small indeed, she would guarantee the payment of all her husband's debts for six years. I cannot see how this construction can be put upon the instrument. I do not rest my opinion upon the hardship to Mrs. Cowan, but it appears to me that it is so improbable that this was the intention of the parties, that I should hesitate long before I put such a construction upon the instrument. And, on the other hand, the instrument will bear the other construction, which is perfectly reasonable. I say nothing as to the other point referred to by the Lord Justice, as I rest my judgment on the construction of the agreement.

THESIGER, L.J.: I am of the same opinion. I agree that in determining the construction of this instrument the court is entitled to look at the surrounding circumstances; that is to say, it is entitled to consider, first, who the parties were; secondly, in what position they were; and, thirdly, what the subject-matter of the *agreement was. Now we [156 find that Morrell was a leather factor, and that Cowan was a shoe manufacturer, and was indebted to him for certain goods supplied to him in the way of trade. Cowan was anxious to get a further supply, which Morrell was willing to furnish if he had a guarantee from Mrs. Cowan, who had separate estate. To these circumstances we may look, but we cannot go further. It is not open to the parties to show that there was a parol bargain that Mrs. Cowan should guarantee her husband's past debts, or that the guarantee should be confined to future debts; that question must rest upon the written instrument alone.

Coming, then, under these circumstances, to the construction of the document, we find, in the first place, that the agreement was for a future supply of goods, and we naturally come to the conclusion that the wife intended to guarantee the payment for such goods. Starting from that, we have, first, the consideration stated, "You having at my request agreed to supply and furnish goods." Obviously, though the agreement was past, the supply of goods was future. Then it proceeds, "I do hereby guarantee to you the sum of £500." We have to ascertain what this means. It is suggested by the respondent that it makes Mrs. Cowan liable to pay £500 for the previously contracted debts of her husband in consideration of a supply of goods which might only amount to a few shillings. This is clearly open to the observation that nothing is said about past debts in the document; and on the other hand, the ordinary and natural construction of the words is that Mrs. Cowan guarantees payment of the goods to be supplied to a maximum of £500. I am, therefore, of opinion that the judgment of Mr. Justice Fry must be reversed.

JAMES, L.J.: The only debt remaining due on account of the goods supplied appears to be £5 16s., the price of the last parcel of goods supplied; and the defendants undertaking to pay that amount to the plaintiff, the bill will be dismissed with costs.

Solicitors for plaintiff: *Speechley, Mumford & Co.*, agents for Rooke & Midgley, Leeds.

Solicitors for defendants: *Torr & Co.*, agents for B. C. Pullan, Leeds.

A guaranty will not cover an antecedent debt unless expressly so agreed: *Wright v. Johnson*, 8 Wend., 512; *Glyn v. Hertel*, 2 J. B. Moore, 134, 150.

See *Pidcock v. Bishop*, 3 B. & C., 605.

An ante-dated bond does not bind the sureties for the period preceding the date of its delivery if its language is not retrospective. A surety is not presumed to have meant to become answerable for acts committed before he signed the obligation: *Hyatt v. Grover*, etc., 41 Mich., 225.

The following instrument signed by the defendant was delivered to the plaintiff: "I guarantee the sum of five hundred dollars value in glass shades purchased by my son A. from

B. Terms of purchase to be sixty days from date of invoice, and, if not paid within ninety days, draft to be drawn on me for the amount." Held, that it was not a continuing guaranty. Held, also, that parol evidence of the previous dealings, or of the dealings contemplated, between the creditor and the principal debtor; or that the guarantor had previously agreed to give the plaintiff a guaranty for further advances, and that the goods were sold relying on such guaranty; or that the relations of the principal parties were well known to the guarantor, was not admissible to show that the instrument was other than a guaranty of a single transaction: *Boston Sandwich Glass Company v. Moore*, 119 Mass., 435.

A guaranty, like every other written

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contract, only takes effect from the time of its execution, and cannot be held to have influenced a party in giving credit on a draft which was drawn before the execution of the guaranty: *Crowder v. Dick*, 24 Miss., 89.

A guaranty may have a retrospective operation so as to embrace debts already

contracted, where it clearly appears that such was the intention of the parties, and an instrument may be ante-dated, so as to embrace a particular transaction, where no fraud or mistake is shown: *Abrams v. Pomeroy*, 13 Ills., 133; *Bagley v. Moulton*, 42 Verm., 184.

[7 Chancery Division, 157.]

C.A., Dec. 6, 1877.

**Ex parte HALLING. In re HAYDON.* [157]

Trader—Execution for Sum exceeding £50—Adverse Claim—Interpleader Summons—Order for Sale and Payment to Execution Creditor—Subsequent Bankruptcy of Debtor—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87.

The goods of a trader were seized on the 19th of August under an execution in respect of a judgment debt of £115. The holder of a bill of sale for £37 10s. claimed the goods, and the sheriff issued an interpleader summons. On the 28th of August a judge ordered that the sheriff should sell the goods, and out of the proceeds pay £37 10s. into court, and pay the balance to the execution creditor, and that an issue should then be tried between him and the bill of sale holder as to the property in the goods at the time of the seizure. On the 7th of September, before the sheriff had sold, the trader filed a liquidation petition:

Held, that the trustee in the liquidation was entitled to the goods, subject to the claim of the bill of sale holder.

Parsons v. Lloyd (!) questioned.

(!) Law Rep., 1 Ex., 307, n.

[7 Chancery Division, 166.]

M.R., Nov. 16, 30, 1877.

**CAMPBELL V. HOLYLAND.* [166]

[1876 C. 104.]

Mortgagor and Mortgagee—Foreclosure Decree—Order Absolute—Adding Parties after—Opening Foreclosure—Practice—Motion—Service on Party having no Interest—Appearance by Counsel—Costs.

If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute:

Thus, where, after decree in a foreclosure action the mortgagor's interest had been purchased by A., and the mortgagee's interest by B., and an order was afterwards made for foreclosure absolute on an *ex parte* application by the plaintiff, the mortgagee, A. and B. were, on motion by A., ordered to be made co-defendants, and a subsequent motion by B. to discharge that order as irregular on the ground that the action was, in fact, at an end, was refused.

In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the court, and depends on the circumstances of each particular case.

The general nature of the circumstances under which foreclosure may be opened, considered.

A party who has been served with a notice of motion, but has no interest in the subject-matter, is not entitled to appear by counsel on the motion merely to ask for his costs.

Thus, where the plaintiff in a foreclosure action, who had parted with his interest, had been served with a notice of motion to reopen foreclosure absolute, and appeared by counsel on the motion and asked for his costs, he was held not to be entitled to his costs of appearance; but inasmuch as, upon his being served with the notice of motion, no intimation was given him that he need not appear, and no tender was made to him of his costs of being advised as to the effect of the motion, he was allowed 40s. costs.

THIS case came before the court on two motions relative to the reopening of a foreclosure decree, under the following circumstances:—

Under the marriage settlement, dated the 30th of December, 1856, of Alexander Theophilus Blakely and Harriette Catherine his wife, Blakely was absolutely entitled to a sum of £7,188 9s. 4d., Reduced Three per Cent. Annuities, subject to his wife's life interest therein and to her general power of appointment over £500, part thereof.

[167] *By an indenture of mortgage dated the 16th of October, 1867, and made between Blakely of the one part, and Robert Campbell of the other part, Blakely mortgaged his reversionary interest in the fund to Campbell for £1,000, with interest at 7 per cent. per annum.

In 1868 Blakely died insolvent, and in 1869 administration to his estate was granted to the defendant Holyland.

In March, 1876, this action was instituted by Campbell against Holyland for foreclosure of the mortgage, and the usual foreclosure decree was made on the 6th of May, 1876.

On the 4th of July, 1876, the Chief Clerk certified that the sum of £1,523 7s. 4d. would be due to the plaintiff Campbell under his mortgage, for principal, interest, and costs, on the 4th of January, 1877, the day on which the period of six months appointed by the decree for payment would expire.

On the 26th of October, 1876, the equity of redemption in the fund was, with the approval of the judge, sold and assigned for £100 to two persons named Mayhew and Graham, and about the same period negotiations by letter passed between Campbell and Messrs. Mayhew and Graham for the purchase by them of Campbell's interest as mortgagee for the sum of £800 and costs.

On the 4th of January, 1877, Messrs. Mayhew and Graham's solicitor met Campbell at the time and place appointed by the foreclosure decree for payment of the mortgage debt, and stated that as his clients had purchased the mortgagee's

interest he did not attend for the purpose of paying the debt, but that his clients considered themselves liable for payment of the purchase-money, and were willing to complete the purchase accordingly.

To this statement it appeared Campbell made no reply.

Subsequently, Messrs. Mayhew and Graham discovered that on the previous day, the 3d of January, Campbell had sold his interest to a Mr. Ford, a solicitor, for £1,000, Ford being at the time aware of the negotiations that had already passed between Campbell and Messrs. Mayhew and Graham.

Messrs. Mayhew and Graham, then, on the 22d of January, 1877, brought an action against Campbell (*Graham v. Campbell* [1877 G. 15]) for specific performance of his alleged agreement for sale to them; but Vice-Chancellor Malins, by whom the action was tried, on the 25th [168 of July, 1877, dismissed it on the ground that Ford had the better title, and that the plaintiffs had failed to prove any binding contract as between themselves and Campbell.

On the 11th of January, 1877, the decree in the foreclosure action was made absolute, upon an *ex parte* application made by Campbell, at Ford's instance. The transactions which had taken place relative to the sale of the interest of the mortgagor and mortgagee were not then brought to the notice of the court, but the application was founded upon an affidavit by Campbell stating simply that the defendant Holyland, the mortgagor, had not attended to pay the mortgage debt on the appointed day, and that the whole of the debt still remained due to the plaintiff.

On the 15th of July, 1877, Graham died, having by will appointed two persons his executors, who duly took out administration to his estate.

On the 2d of November, 1877, being the first day of the Michaelmas Sittings, Mayhew and Graham's executors, as a preliminary step to applying to have the foreclosure decree reopened, moved *ex parte* that they and Ford should be added as defendants to the action, and that the proceedings in the action should be carried on between the plaintiff and the original defendant and such new defendants as if they had been originally defendants; and on the same day an order was made to that effect.

On the 16th of November, 1877, Ford moved to discharge the last mentioned order.

Bagshawe, Q.C., and *Bush*, in support of the motion, contended that the action was at an end; that there were therefore no proceedings which could be continued; and that the order of the 2d of November, 1877, was irregular

and ought to be discharged. They referred to *Patch v. Ward*(¹).

Chitty, Q.C., and *Rendall*, for Mayhew and Graham's executors, *contra*, were not called upon.

JESSEL, M.R.: I think the order of the court which is [169] sought to be set aside *must stand. An order for foreclosure, according to the practice of the old court of Chancery, was never really absolute, nor can it be so now. In cases of great hardship a mortgagor might have obtained further time for payment, and the suit was allowed to go on after decree. The decree, though final in terms, was not final in fact, and the suit could not be considered as terminated.

The practice is that if in a foreclosure action one of the parties assigns his interest, and the other party thinks it right to have the assignee before the court, the assignee is not entitled to object, as it is desirable in all litigation to have all the parties interested before the court. In this case it is better for the purchaser from the mortgagee, who is the person really interested, as well as for everybody else, that he should conduct his own case. It seems to me, therefore, having regard to the nature of the litigation, that he ought to remain before the court. The motion must be refused, but as the case is a novel one the costs will be costs in the action.

Nov. 30. The case came again before the court on a motion by the defendants Mayhew and Graham's executors to reopen the foreclosure decree.

It appeared that on the 12th of November, 1877, these defendants made a tender by letter to their co-defendant Ford of the amount of the mortgage debt and costs, with a request for the reassignment of the mortgaged property. Ford, however, declined to make any reassignment, whereupon his co-defendants now moved to reopen the foreclosure decree by asking that he might be ordered to reassign the mortgaged property to them on payment within ten days of the mortgage debt of £1,523 7s. 4d., interest and costs.

In an affidavit filed by Mayhew in support of the motion, he stated that the right of redemption now claimed by himself and Graham's executors was a very valuable one, not only on account of the intrinsic value of the reversion itself, but also by reason of the advantageous position it would give them in certain other litigation now pending relative to this very fund.

(¹) Law Rep., 3 Ch., 203.

Ford, on the other hand, stated by affidavit that his special object in purchasing Campbell's interest as mortgagee was to make over the benefit of the purchase—as he intended to do—to Mrs. *Blakely, the present tenant [170 for life of the fund, she being an old friend and client of his.

Chitty, Q.C., and *Rendall*, for the motion: The order for foreclosure absolute was obtained irregularly, and therefore cannot stand.

[They were stopped by the court.]

Bagshawe, Q.C., and *Bush*, for Ford: The mortgagors were not ready with their money on the appointed day, and that, we submit, is a sufficient answer to this motion; the rule being that after the order for foreclosure has been made absolute it must be shown that the person who seeks to set it aside fully intended and was prepared to pay the money on the day, but was estopped by some accident from doing so; otherwise he can only be relieved on the ground of fraud: *Patch v. Ward* (*). No fraud, however, is alleged in the present case: the utmost that can be said is that there may have been irregularity; but in *Patch v. Ward* the order was obtained irregularly, and yet the Court of Appeal held that an insufficient ground for setting it aside. The court will not even entertain an application to enlarge the time for redemption without some satisfactory reason being given by the mortgagor for non-payment at the appointed day: *Nanny v. Edwards* (*). Moreover, if a mortgagor desires to have a foreclosure decree opened, he must come promptly; he cannot lie by and let the mortgagee deal with the property as his own, and then come and offer to redeem: *Thornhill v. Manning* (*).

Now, in the present case, the mortgagors must be taken to have known as long ago as the 4th of January, 1877, that the result of their non-payment of the mortgage debt on that day would be an order for foreclosure absolute, and the order was in fact made on the 11th of January; yet until now, that is, until after a lapse of nine months, they never applied either for enlargement of the time for redemption, or for opening the foreclosure. Having elected to stand on their alleged purchase of the mortgagee's interest instead of *on their right to redeem, and having been defeated [171 in their attempt to enforce their supposed contract, it is now too late for them to come and ask to have the foreclosure opened. If a mortgagor can have foreclosure opened in such a case as this where the mortgagee has parted with his interest under the order absolute to a purchaser for value,

(*) Law Rep., 3 Ch., 203, 212. (*) 4 Russ., 124. (*) 1 Sim. (N.S.), 451 454.

no purchaser's title under such an order can ever be considered safe.

JESSEL, M. R.: I have no doubt that I ought to make the order asked for.

The question in dispute is really whether a mortgagor can be allowed to redeem after an order of foreclosure absolute, and I think, on looking at the authorities, that no Chancellor or Vice-Chancellor has ever laid down that any special circumstances are essential to enable a mortgagor to redeem in such a case.

Now what is the principle? The principle in a court of equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and it must be remembered that the doctrine arose at the time when mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract between the parties; yet courts of equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and that the mortgage money should be debt; and they gave relief in the shape of redemption on that principle. Of course that would lead, and did lead, to this inconvenience, that even when the mortgagor was not willing to redeem, the mortgagee could not sell or deal with the estate as his own, and to remedy that inconvenience the practice of bringing a foreclosure suit was adopted, by which a mortgagee was entitled to call on the mortgagor to redeem within a certain time, under penalty of losing the right of redemption. In that foreclosure suit the court made various orders—interim orders fixing a time for payment of the money—and at last there came the final order which was called foreclosure absolute, that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the 172] *original deed was form only; for the courts of equity soon decided that, notwithstanding the form of that order, they would after that order allow the mortgagor to redeem. That is, although the order of foreclosure absolute appeared to be a final order of the court, it was not so, but the mortgagee still remained liable to be treated as mortgagee and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the court. Therefore everybody who took an order for foreclosure absolute knew that there was still a discretion in the court to allow the mortgagor to redeem.

Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the court of equity which had made the order.

That being so, on what terms is that judicial discretion to be exercised? It has been said by the highest authority that it is impossible to say *à priori* what are the terms. They must depend upon the circumstances of each case. For instance, in *Thornhill v. Manning* (*) Lord Cranworth said you cannot lay down a general rule. There are certain things laid down which are intelligible to everybody. In the first place the mortgagor must come, as it is said, promptly; that is, within a reasonable time. He is not to let the mortgagee deal with the estate as his own—if it is a landed estate, the mortgagee being in possession of it and using it—and then without any special reason come and say, “Now I will redeem.” He cannot do that; he must come within a reasonable time. What is a reasonable time? You must have regard to the nature of the property. As has been stated in more than one of the cases, where the estate is an estate in land in possession—where the mortgagee takes it in possession and deals with it and alters the property, and so on—the mortgagor must come much more *quickly than where it is an estate in reversion, as to [173 which the mortgagee can do nothing except sell it. So that you must have regard to the nature of the estate in ascertaining what is to be considered reasonable time.

Then, again, was the mortgagee entitled to redeem, but by some accident unable to redeem? Did he expect to get the money from a quarter from which he might reasonably hope to obtain it, and was he disappointed at the last moment? Was it a very large sum, and did he require a considerable time to raise it elsewhere? All those things must be considered in determining what is a reasonable time.

Then an element for consideration has always been the nature of the property as regards value. For instance, if an estate were worth £50,000, and had been foreclosed for a mortgage debt of £5,000, the man who came to redeem that

(*) 1 Sim. (N.S.), 451, 454.

estate would have a longer time than where the estate was worth £5,100, and he was foreclosed for £5,000. But not only is there money value, but there may be other considerations. It may be an old family estate or a chattel, or picture, which possesses a special value for the mortgagor, but which possesses not the same value for other people; or it may be, as has happened in this instance, that the property, though a reversionary interest in the funds, is of special value to both the litigants: it may possess not merely a positive money value, but a peculiar value having regard to the nature of the title and other incidents, so that you cannot set an actual money value upon it. In fact, that is the real history of this contest, for the property does not appear to be of much more money value—though it is of some more—than the original amount of the mortgage. All this must be taken into consideration.

Then it is said you must not interfere against purchasers. As I have already explained, there are purchasers and purchasers. If the purchaser buys a freehold estate in possession after the lapse of a considerable time from the order of foreclosure absolute, with no notice of any extraneous circumstances which would induce the court to interfere, I for one should decline to interfere with such a title as that; but if the purchaser bought the estate within twenty-four hours [74] after the foreclosure absolute, and with *notice of the fact that it was of much greater value than the amount of the mortgage debt, is it to be supposed that a court of equity would listen to the contention of such a purchaser that he ought not to be interfered with? He must be taken to know the general law that an order for foreclosure may be opened under proper circumstances and under a proper exercise of discretion by the court; and if the mortgagor in that case came the week after, is it to be supposed a court of equity would so stultify itself as to say that a title so acquired would stand in the way? I am of opinion it would not.

Now I come to the circumstances of this case, and I must say they are very strong in favor of opening the foreclosure. As I said before, it is a sum of money in reversion, the title to which, no doubt, is to some extent in dispute, but which both parties are very desirous to possess for special reasons of their own. It appears to have a special value as well for the purchaser as the mortgagor. The intrinsic money value was thought by the parties at the time of the negotiations I am about to mention, to be really less than the mortgage debt; the mortgage money was carrying 7 per cent. interest, and

negotiations were entered into by the mortgagor—or the persons standing in the position of mortgagor—with the mortgagee not to redeem in terms, but to buy up the mortgage for a less sum. Those negotiations were supposed by the mortgagor to have resulted in an agreement to purchase, and acting under that belief he did not attend at the day with the money to pay off the mortgage, but he came and told the mortgagee he was willing to pay the purchase-money for the mortgage and keep the property.

Now, what happened in the meantime? The present purchaser, Mr. Ford, being very desirous to acquire the property for a collateral object—I am not saying a wrong object, but a collateral object—had, before the time for foreclosure absolute had arrived, entered into a contract with the mortgagee to buy it. He was not a purchaser coming in even the day after foreclosure, but a purchaser coming in before foreclosure, and at that time of course he knew the property was redeemable. He bought a property certainly redeemable, for the day for redemption had not even arrived. That is the kind of purchase I am dealing with. He *was [175 aware on the day of redemption that it was not from unwillingness to redeem that the mortgagor failed to pay the money, but because the mortgagor was under the belief that he had acquired a right to take the property on paying less than the mortgage money, by reason of a contract of purchase with the mortgagee. What happened next? The mortgagor endeavored by suit in equity to enforce his contract to purchase. That came on for hearing before Vice-Chancellor Malins in July, and then the Vice-Chancellor decided that Mr. Ford, the present purchaser, had the better title, and the mortgagor failed in enforcing his agreement for purchase with the mortgagee. On the 2d of November, as soon as the courts opened after the long vacation, the motion to revive the suit and enable the redemption motion to come on was made, and very shortly after that this motion was made which I have now to decide.

I think, under these circumstances, that the mortgagor has been sufficiently prompt. I entirely agree with the various authorities which have been quoted, that reasonable promptness ought always to be shown. I say reasonable promptness, because what is promptness is, as I have said, not an abstract proposition, but must depend on the circumstances of the case. I think the mortgagor has been sufficiently prompt. I think the purchaser is not in a position to terrorize the court as to the evils that would happen by opening a foreclosure after sale. As I said before, I by no means

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say that the fact of a sale would not be an important fact; it ought to weigh with the court in opening foreclosure.

I am of opinion, however, that such a sale as this ought to have no weight whatever, and that under the circumstances the mortgagor is entitled to open the foreclosure on the usual terms, that is, on payment of principal, interest, and costs.

Waller, Q.C., and *Dundas Gardiner*, for the plaintiff, who had been served with the notice of motion, now asked for their costs.

JESSEL, M.R.: I have said many times since I have had the honor of a seat on the bench, that I do not recognize what some judges have said is the rule, that every party [176] served is entitled to appear merely *to ask for his costs. It does not appear to me that, in any event, the plaintiff could have any interest whatever in this question, and therefore I shall not give him any costs of appearance.

Waller then urged that the plaintiff was at least entitled to 40s. costs, inasmuch as, when he was served with the notice of motion, no intimation was given that he need not appear, and no tender was made to meet the cost of being advised as to the effect of the notice.

Chitty, contra.

JESSEL, M.R.: I think the plaintiff is entitled to 40s. costs, and I shall, therefore, order that sum to be paid to him.

Solicitors: *Mayhew, Salmon & Whiting*; *W. & A. R. Forde*; *Dawson, Bryan & Dawson*.

See *ante*, note to *West*, etc., v. *Nickolls*, p. 211.

[7 Chancery Division, 181.]

M.R., Dec. 1, 1877.

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[1861 W. 251.]

Will—Precatory Trust for "Children"—Execution of Trust—Power of Trustee to limit to "separate use."

Where a precatory trust has been created by will in favor of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use.

ADJOURNED SUMMONS. Mary Ann Kymer, who died in 1829, by her will, dated the 17th of June, 1824, after requesting her sister Eliza Kymer to perform her wishes as therein expressed, bequeathed various legacies to her brothers and

sisters and their children, including a legacy of £3,000 to her brother John Kymer for life, "the principal to be divided at his death between his children, John, Sophia, and Mary Ann."

On the 7th of October, 1828, the testatrix executed a codicil as follows: "I bequeath to my sister Eliza all I possess, requesting at her death she will leave the sums as I have directed heretofore."

Eliza Kymer, by her will, dated the 19th of May, 1859, after reciting that she was desirous that the bequests and requests of her said sister Mary Ann should be carried into effect as far as might be, whether she was bound to carry them into effect or not, confirmed the several bequests of money made and requested to be paid by her said sister's will, and declared that the trustees of her will should, out of any estate and effects belonging to her at her decease, and whether originally forming part of her said sister's estate or not, raise the several legacies by her said sister's will and codicil bequeathed or requested to be paid to or in trust for each of her brothers and sisters and their children, and should pay and apply the same accordingly, in order so far as possible to carry into effect the wishes and requests of her said sister with reference thereto as expressed in her said will and codicil. The testatrix then, after bequeathing various legacies and disposing of the *residue of her estate, [182 declared that "in the event of any of the female legatees under that her will being married at the time of her decease, their respective legacies or shares of residue under that her will should be for their respective separate use, independent of their respective husbands, and their respective receipts alone should be good discharges for all moneys thereinbefore directed to be paid to them."

The testatrix, Eliza Kymer, died on the 26th of February, 1861, and shortly afterwards this action was instituted and the usual decree made for the administration of the estates of herself and her sister Mary Ann Kymer.

In 1842, in the lifetime of Eliza Kymer, Sophia Kymer, one of the daughters of John Kymer, the tenant for life of the £3,000 legacy, married David Wilson, and by the settlement made upon her marriage, covenanted with trustees to settle her after-acquired property, "except any estates or interests which should be limited to her separate use."

Mrs. Wilson survived Eliza Kymer and died on the 21st of May, 1870, having made a will appointing her husband her sole legatee and executor, and he subsequently took out administration to her estate.

John Kymer, the tenant for life, died in January, 1877, whereupon the question arose whether Mrs. Wilson's share of the £3,000 legacy was bound by the covenant in her marriage settlement; in other words, whether the share had been properly limited to her separate use by Eliza Kymer's will, so as to fall within the exception to the covenant.

The question was raised by a summons taken out by Mr. Wilson asking for payment of the share—consisting of £1,031 13s. cash in court—to him as his wife's legal personal representative.

By an order made on further consideration it had been declared that Mary Ann Kymer's will and codicil constituted Eliza Kymer a trustee.

W. C. Fooks, for the summons: If Mrs. Wilson's share was properly limited to her separate use it unquestionably falls within the exception to the covenant in her marriage settlement. But the question is whether, inasmuch as 183] *the precatory trusts created by Mary Ann Kymer's will and codicil in favor of John Kymer's children prescribed no limitation to separate use, Eliza Kymer, as the trustee, was capable of executing the trust as she has done, by adding such a limitation. There appears to be no express authority upon the point, but I submit that Eliza did not exceed her powers, for the limitation to separate use as to the daughter's shares was nothing more than a proper mode of carrying out her sister's intention that the daughters should take for their own benefit.

S. A. Bennett, for the trustees of the settlement, submitted that as Eliza was a mere trustee she had no power to super-add to Mary Kymer's bequest the condition of separate use.

JESSEL, M.R.: The question is whether, where a precatory trust has been created by will in favor of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use.

This, as far as I know, is a new point; but I must say, having regard to the principle on which the court proceeds with respect to precatory trusts, that is, looking, as I do in the present case, at the intention of the testatrix Mary Ann Kymer, I do not feel any doubt upon the subject. I am of opinion that Eliza had power to attach a limitation to separate use.

It has been held in the action that this was a precatory trust vested in Eliza; in other words, that she was bound to dispose of the money as directed by her sister. Eliza has done so by her will by directing that the money shall be paid and applied to or for the benefit of her brother and his

children, in order, as far as possible, to carry out her sister's wishes. But she has gone on to say that in the case of female legatees who may be married at her decease their shares under her will shall be for their separate use.

Now, the original will and codicil say nothing about separate use. They merely direct her to leave the money, after her brother's death, to his children, and nothing more. She is, therefore, bound not to make a different disposition. Well, she has *conformed to that direction by leav- [184 ing the money to the children, and in doing so has taken care to dispose of it in such a manner that the shares of the daughters shall, in case of their marriage, still remain for their own benefit, thus effectually carrying out her sister's intention.

I am of opinion, therefore, that Eliza has complied with the directions contained in her sister's will, and accordingly that Mrs. Wilson's share falls within the exception to the covenant in her marriage settlement. The fund will, therefore, be paid to her husband.

Solicitors: *Wilson, Bristows & Carpmæl; R. Quick.*

[7 Chancery Division, 188.]

M.R., May 7, 1877.

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[1876 W. 294.]

Mortgagor and Mortgagee—Mortgage of Ship—Redemption Decree—"Just Allowances"—Expenses of enforcing Security—Taking and holding Possession, Advertising for Sale, and Insurance—Cons. Ord. xxiii, r. 16.

The mortgagees of a ship having seized it and advertised it for sale the mortgagors brought an action against them for redemption, and moved for an injunction to restrain the sale, when, upon the defendants undertaking not to proceed with the sale, a decree was taken by consent in the action, directing an account of what was due on the mortgage for "principal and interest," and redemption on payment by the mortgagors of the amount certified:

Held, upon summons by the defendants, the mortgagees, that they were justified in seizing the ship, and that, in taking the account directed, they were entitled to be allowed expenses incurred by them in taking and holding possession of the ship, advertising it for sale, and effecting insurances, under the head of "just allowances."

Horlock v. Smith (1) considered (2).

ADJOURNED SUMMONS. The plaintiff, who was the registered owner of a bark called the *Matilde*, obtained, through a firm of Proust & Desseaux, merchants, of Havre, a loan from one Cummins of £1,000, such sum being secured by a mortgage of the bark to Cummins; and Cummins took,

(1) 1 Coll., 298.

v. *Tipton Moat Colliery Company* (post,

(2) See *Tipton Green Colliery Company* p. 192.)

189] as collateral security, a bill of exchange, *drawn by Proust & Desseaux on, and accepted by, the defendants, a firm of merchants in London. The defendants at the same time took, by way of indemnity, a cross bill from Proust & Desseaux, accepted by the latter.

It appeared that the plaintiff was in reality a person of no means, being a working stevedore at Havre, and that he was merely the nominee of Proust & Desseaux, who were, in fact, the real owners of the ship.

The bill accepted by the defendants was duly paid at maturity, but that accepted by Proust & Desseaux was dishonored. The defendants thereupon sued and obtained judgment against Proust & Desseaux in the French court at Bordeaux for the amount of the dishonored bill, and took a transfer of Cummins' mortgage.

Default was made in payment of interest under the mortgage, and the bark, arriving shortly afterwards at Liverpool, was seized by the defendants under an order from the Admiralty Division, and advertised by them for sale.

The plaintiff then brought an action, on the 3d of August, 1876, against the defendants for redemption of the mortgage, and on the 25th of August moved for an injunction to restrain the sale, when, upon the defendants undertaking not to proceed with the sale, and upon a sum of money being brought into court by the plaintiff in part payment of his mortgage debt, a decree was made in the action, by consent, directing "an account of what, if anything, was due from the plaintiff to the defendants for principal and interest" under the mortgage; and delivery up of the mortgage security upon the plaintiff paying "what should be certified by the Chief Clerk to be the total amount of principal and interest, within a month from the date of the certificate": the question of the costs of the action being reserved. No statement of claim or defence was delivered in the action.

The Chief Clerk, by his certificate, found that the sum of £72 17s. 5d. was due to the defendants for principal and interest under the mortgage, but disallowed a sum of £50 10s. claimed by them for expenses incurred in taking and holding possession of the ship, advertising it for sale, and effecting insurances.

A summons was then taken out by the defendants for the purpose of taking his Lordship's opinion upon the point 190] (amongst *others which it is unnecessary to notice) whether their claim of £50 10s. in respect of the items above mentioned should be allowed.

Chitty, Q.C., and *C. H. Turner*, for the summons: These

items represent expenses necessarily incurred for the purpose of enforcing and giving effect to our security, and we therefore submit we are entitled to have them allowed under the head of "just allowances," pursuant to Cons. Ord. XXIII, r. 16 (22d Aug., 1859), *Morgan* (¹), which is still in force, and which provides that "in taking any account directed by any decree or order, all just allowances shall be made, without any direction for that purpose in such decree or order."

Davey, Q.C., and *E. C. Willis*, for the plaintiff: The decree having been taken by consent, and the only account directed being for principal and interest, the defendant must be held to have waived these items. At all events, to entitle him to these allowances, he should have made out a case for them by his pleadings, as in *Merriman v. Bonney* (²), where Vice-Chancellor Kindersley held that to entitle a mortgagee to an inquiry as to "costs, charges, and expenses properly incurred in relation to the mortgage security," he must make out a case by his bill. In *Seton on Decrees* (³), *Horlock v. Smith* (⁴) is cited as an authority that a mortgagee could not be allowed the costs of a successful ejectment under the head of "just allowances" where the decree was silent as to such costs.

[JESSEL, M.R.: That case was decided in 1844, before the order under which "just allowances" are now imported into every decree directing accounts. The case is not quite correctly stated in *Seton*, for the decision clearly intimates that if "just allowances" had been mentioned in the decree the costs of the ejectment by the mortgagee, that is, the costs incurred by her in enforcing and giving effect to her security, would have been allowed. Mr. Wigram, in his argument, states the law to be that in an account between mortgagor and mortgagee, the mortgagee *is entitled [191 to all costs incurred in fairly and reasonably maintaining his title at law; and in support of that proposition he cites *Dryden v. Frost* (⁵) and *Ellison v. Wright* (⁶). To that statement of the law Vice-Chancellor Knight Bruce in reality assents, but under the particular circumstances of the case he declined to give the mortgagee the costs.]

This is really a summons to alter the decree, and in *Barron v. Lancefield* (⁷), where a foreclosure decree had been made and the accounts taken, it was held that the mortgagee could not, on petition, obtain an order altering the decree so

(¹) 5th ed., p. 478.

(²) 12 W. R., 461.

(³) 3d ed., p. 381.

(⁴) 1 Coll., 298.

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(⁵) 8 My. & Cr., 670.

(⁶) 8 Russ., 458.

(⁷) 17 Beav., 208.

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as to give him costs subsequently incurred in relation to his security.

[JESSEL, M.R., in the course of the argument referred to Dan. Ch. Pr. (¹), and to the following cases, in which "just allowances" were held to include—executors' charges and expenses, *Fearn v. Young* (²); payments by them in discharge of legacies, *Nightingale v. Lawson* (³); deduction for dower out of rents receivable by a widow-trustee, *Graham v. Graham* (⁴); expenses of managing and carrying on a partnership business, *Brown v. De Tastet* (⁵); *Cook v. Collingridge* (⁶); but not to include setting off taxed costs by a solicitor accountable for rents received by him as steward or agent: *Jolliffe v. Hector* (⁷).]

JESSEL, M.R.: The real question to be decided is whether or not the defendants are entitled to the costs of seizing and holding a ship of which they are mortgagees; and that depends upon the preliminary question, whether they were, as such mortgagees, warranted in taking possession. Now, upon the latter question, the rule is well settled that, after default in payment of principal and interest, mortgagees are justified in taking possession of the mortgaged property. In the present instance the plaintiff was clearly in default, and accordingly when the ship came within the jurisdiction the defendants, the mortgagees, seized it under an order of 192] *the Admiralty Division, which was the right way of taking possession. A balance is still due to the defendants on the mortgage, and, as far as I can see, if they had not seized the vessel they would not have been paid. That was their only possible security, and the only way of getting back their money.

I am therefore of opinion that the defendants were entitled to seize the ship; and as the costs of seizure and the other subsequent costs claimed by them were necessarily incurred in enforcing their security so as to enable them to reap the benefit of it, I think I am quite justified, having regard to the authorities, in allowing, as I do, this claim under the head of "just allowances." That being so, the defendants are also entitled to have their costs of this summons added to their security.

Solicitors: *S. Chapman; Keene & Marsland.*

(¹) 5th ed., pp. 1132-6.

(⁵) Jac., 284, 299.

(²) 10 Ves., 184.

(⁶) Jac., 607, 621.

(³) 1 Cox, 23.

(⁷) 12 Sim., 398.

(⁴) 1 Ves. Sen., 262.

See Thomas on Mort., 442 *et seq.*; Herman on Chat. Mort., 207 *et seq.*

foreclosing a chattel mortgage, see Willet v. Scovil, 4 Abb. Pr., 405.

As to what are proper expenses on

The following rules governing chat-

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tel mortgages may be regarded as settled :

1. At law, a chattel mortgage vests the legal title to the property mortgaged in the mortgagee, subject only to be defeated by a performance of the condition of the mortgage.

Illinois : *Simmons v. Jenkins*, 76 Ill., 479; *Jefferson v. Bank*, 1 Bradwell, 568.

See *Arnold v. Stock*, 81 Ill., 407.

Michigan : In this state, by statute, the mortgage is a security merely : *Kohl v. Lynn*, 84 Mich., 360; *People v. Bristol*, 35 Mich., 28.

Missouri : *Bowens v. Benson*, 65 Mo., 26.

New York : *Bank v. Jones*, 4 N. Y., 498; *Hall v. Sampson*, 35 N. Y., 274, reversing 19 How. Pr., 481; *Judson v. Easton*, 58 N. Y., 664; *Hill v. Beebe*, 13 N. Y., 565; *Bragleman v. Dane*, 69 N. Y., 69; *Olcott v. Tioga*, etc., 40 Barb., 180, affirmed 27 N. Y., 546; *Farmers' Bank v. Cowan*, 2 Keyes, 217, 2 Abb. App. Dec., 88; *Butler v. Miller*, 1 N. Y., 496; *Huggans v. Fryer*, 1 Lansing, 276; *Halstead v. Swartz*, 1 Thompson & Cooke, 559; *Dane v. Malory*, 16 Barb., 46; *Shuart v. Taylor*, 7 How. Pr., 251; *Stoddard v. Denison*, 38 How. Pr., 296, 2 Sweeney, 54; *Ray v. Fedderke*, 43 N. Y. Superior Ct. R., 335; *Stewart v. Slater*, 6 Duer, 83; *Haskins v. Kelly*, 1 Rob., 171; *Patchin v. Pierce*, 12 Wend., 61; *Bunaclugh v. Poolman*, 3 Daly, 236.

Ohio : *Robinson v. Fitch*, 26 Ohio St. R., 659.

Where a chattel mortgage contained a provision that, upon default of payment of the mortgage debt at the time agreed on, the mortgagee might sell the property at auction or private sale and pay the debt and expenses out of the avails, held, the mortgagee's title became absolute upon default in payment without any sale being made : *Burdick v. McVanner*, 2 Denio, 170.

Upon default in the payment of a chattel mortgage, the title to the mortgaged property becomes absolute in the mortgagee, and where the mortgagor has converted the property, no demand is necessary : *Woodbridge v. Nelson*, 6 N. Y. Weekly Dig., 248, 13 Hun, 390.

It has been held, that even after forfeiture the mortgagee has no right to use force to take the property from the

mortgagor : *Thornton v. Cochran*, 51 Ala., 415.

Though it has been held the mortgagee may, under a clause authorizing him to take said goods, chattels and property into his possession at any time he may think proper, break and enter the mortgagor's house without his permission and take the mortgaged property : *Braley v. Byrnes*, 21 Minn., 482.

2. As an incident to such title, the mortgagee may take immediate possession of such property, unless restrained by some clause in the mortgage giving the mortgagor a right to some qualified possession.

Illinois : *Simmons v. Jenkins*, 76 Ill., 479.

Michigan : In this state it seems to be held that the mortgagor is entitled to possession until demand : *Cadwell v. Pray*, 41 Mich., 308.

New York : *Hall v. Sampson*, 35 N. Y., 274, reversing 19 How. Pr., 481; *Farmers' Bank v. Cowan*, 2 Keyes, 217, 2 Abb. Dec., 88; *Shuart v. Taylor*, 7 How. Pr., 251; *Stewart v. Slater*, 6 Duer, 83.

Where the mortgagee of the interest of one tenant in common of a chattel causes the whole chattel to be sold at a public sale, by virtue of his mortgage, one who purchases and takes possession of the chattel at such sale, with notice of the rights of the other tenant in common thereof, is liable to the latter in an action by him for the conversion of his interest therein : *Van Doren v. Balty*, 11 Hun, 239.

3. Where the instrument specifically defines the circumstances under which the right of possession is to vest in the mortgagee, the law implies an intent that it is to remain meantime in the mortgagor.

Arkansas : See *McLeod v. Bernhold*, 32 Ark., 671.

Illinois : *Simmons v. Jenkins*, 76 Ill., 479.

Michigan : *Cadwell v. Pray*, 41 Mich., 308.

New York : *Hall v. Sampson*, 35 N. Y., 274, reversing 19 How. Pr., 481.

An injunction lies at suit of a mortgagor of chattels, with reservation of possession for a certain time, to prevent the mortgagee from taking possession before the time limited. So held, where the mortgage was constituted by a

bill of sale and assignment made by the one party, and a separate stipulation to leave him in possession given by the other: *Ford v. Ransom*, 8 Abb. Pr., N.S., 416.

Where personal property, which is mortgaged, has been wrongfully converted, an action to recover its value may be maintained by the mortgagee, although the money secured by the mortgage is not yet due, if there is a clause in the mortgage which authorizes the mortgagee, at any time he shall deem himself insecure, to take possession of the mortgaged property and sell it, to satisfy the debt: *Chadwick v. Lamb*, 29 Barb., 518; *Frisbee v. Langworthy*, 11 Wisc., 375.

A provision in a deed of trust to secure a debt, that the grantors may retain possession of the property until the maturity of the debt, unless they do some act inconsistent with the deed, does not affect the trustee's right of possession as against third parties; and where the property is taken out of the possession of the grantor, under an adverse claim, he may sue for its recovery: *McLeod v. Bernhold*, 32 Ark., 671.

Where a chattel mortgage provides that the mortgagee may take possession and sell whenever he may deem himself insecure, his rights under that provision do not depend upon his having *reasonable ground* for deeming himself insecure (*Huebner v. Kockke*, 42 Wisc., 819), nor is such a contract a hard and unconscionable one, especially as the right of possession passes (with the legal title) by the mortgagee, in the absence of any agreement to the contrary, and as the statute makes the mortgage, if not filed in the clerk's office, invalid, except as against the parties thereto, unless the mortgagee takes and retains the possession. By the terms of chattel mortgages, the mortgagee had the right to take possession and sell whenever she might deem herself insecure. When about to take possession she was restrained by an injunctive order, which required her to accept additional security tendered by the mortgagor, and also required the mortgagor to make an inventory of the property (which was stock in trade), and pay over a certain part of the proceeds of sale thereof to be applied on his notes to the mortgagee as they became due,

etc.; and forbade the mortgagee to interfere with the property.

Held, an unauthorized interference with the mortgagee's rights under the contract: *Cline v. Libby*, 46 Wisc., 123; *Huggans v. Fryer*, 1 Lansing, 276.

See also *Frisbee v. Langworthy*, 11 Wisc., 375.

A party leasing a hotel gave the landlord a chattel mortgage on her furniture, bedding, etc., to secure the payment of rent. It provided that the mortgagor should retain possession until default in payment, but authorized the mortgagee to take possession at any time he should think the property was in danger of being sold, removed, etc. The rent was regularly paid, but the mortgagee, without any cause to believe the property was in danger of being sold or removed, replevied the same, and, on the trial, did not testify that he even believed such danger existed: Held, that he was not entitled to recover, and that, before he could take possession, he must have had a reasonable apprehension that the property would be sold or removed: *Furlong v. Cox*, 77 Ills., 293.

See *Sherman v. Clark*, 24 Minn., 37; *McClelland v. Nichols*, 24 Minn., 176; *Stein v. Munch*, 24 Minn., 391.

Where a chattel mortgage is given on household furniture and goods, to secure a debt, giving the mortgagee the right to take possession at any time he should feel himself insecure or unsafe, or fear waste, diminution or removal, and he takes possession on the same day and at an unusual hour without previous notice, from malicious motives or without a reasonable belief that his debt is unsafe or insecure, he will be liable to the mortgagor in trespass, and if the taking is malicious, the jury may give exemplary damages.

Where the mortgagee wrongfully takes possession of mortgaged chattels before his debt is due, and the mortgagor procures a prior mortgagee to replevy the same from him, and they are sold under the prior mortgagee in payment of a debt of the mortgagor, the proper measure of the mortgagor's damages, in trespass for the wrongful taking, will be the difference between the market value of the property at the time it was first taken, and its market value when retaken on the replevin suit, together with such other actual

loss to business, or otherwise, as may be proved as the direct result of the first taking. The defendant will not be liable for any injury to the property after the retaking, nor for any loss consequent upon the necessary result of a sale at auction by the second mortgagee.

Where a chattel mortgage on household goods was given at ten o'clock in the morning, and the mortgagee's agent seized and removed the property at six o'clock in the evening of the same day, under a clause giving him the right to take possession when he should feel himself insecure, or unsafe, and he is sued in trespass, it was held, that he had the right to prove by the agent his directions as to taking possession, to disprove the inference of malice arising from the fact of taking the property at an unusual hour, without previous notice: *Davenport v. Ledger*, 80 Ills., 574.

Where the owner of a chattel mortgage, containing no clause as to the right of possession, brought an action of trover, before the code, for a sale of the mortgaged property, made without his assent, before the mortgage money had become due and when he had not taken possession, held that the action would lie: *Shuart v. Taylor*, 7 How. Pr., 251.

Where a chattel mortgage provided that the property therein mentioned should remain in the possession of the mortgagor until the indebtedness thereby secured became due, unless the mortgagee should, for any reason, feel unsafe or insecure, and elect to take immediate possession, it was held, that a levy upon the goods by an officer, and taking possession of the property under an execution against the mortgagor, gave the mortgagee a clear right to treat the condition of the mortgage broken, and to reclaim the possession, both as against the mortgagor and the officer making the levy: *Lewis v. D'Arcy*, 71 Ills., 648.

Where a mortgage contains no insecurity clause, and the debt matures before sale under the officer's writ, or where the mortgage contained such clause and the property is levied upon, the mortgagee may demand the property of the officer, and on refusal to surrender the same, maintain trover or replevin in the detinet for the wrongful detention: *Simmons v. Jenkins*, 76

Ills., 479; *Frisbee v. Langworthy*, 11 Wisc., 375.

Where there was a provision in a chattel mortgage that the mortgagor should remain in possession until default in payment, unless he or some other person should attempt to sell, assign, remove or otherwise dispose of the property; held, that the seizure of the property before default on a distress warrant for rent due from the mortgagor, entitled the mortgagee to the immediate possession, and that after demand and refusal replevin would lie against the bailiff for the wrongful detention: *Conkey v. Hart*, 14 N. Y., 23; *Frisbee v. Langworthy*, 11 Wisc., 375.

See *Loucks v. McSloy*, 29 U. C. C. Pl., 54.

A chattel mortgage provided that the mortgagee might take possession in case the property was sold. Held, that a demand of *payment* before the debt was due was not a demand for the goods; especially if made by the assignor of the debt from the vendor of the goods, since both had parted with their interests: *Cadwell v. Pray*, 41 Mich., 308.

The right to the immediate possession of the property in controversy, being essential in order to maintain replevin, that action cannot be maintained by the mortgagee of chattels before condition broken, where, by the terms of the mortgage, the mortgagor is entitled to retain the possession and use until the maturity of the debt.

In such case, if the security of the mortgagee is placed in jeopardy by proceedings on behalf of the other creditors of the mortgagor, the appropriate remedy of the mortgagee is by a proceeding in equity: *Curd v. Wander*, 5 Ohio St. Rep., 92.

4. Until the possessory right of the mortgagor ceases, his interest is subject to seizure and sale under legal process at the instance of his creditors.

Illinois: *Simmons v. Jenkins*, 76 Ills., 479.

Michigan: *Nelson v. Ferris*, 30 Mich., 497.

New York: *Hall v. Sampson*, 35 N. Y., 274, reversing 19 How. Pr., 481, 23 How. Pr., 84; *Hull v. Carnley*, 11 N. Y., 501, reversing 2 Duer, 99, 1 Abb. Pr., 158, 11 N. Y. Leg. Obs., 334; *Manning v. Monaghan*, 28 N. Y., 585, reversing 1 Bosw., 459; *Hammill v.*

Gillespie, 48 N.Y., 556; *Farmers' Bank v. Cowan*, 2 Keyes, 217, 2 Abb. Dec., 88; *Stewart v. Slater*, 6 Duer, 83; *Liver v. Orser*, 5 Duer, 501; *Gelhar v. Rose*, 1 Hilton, 117.

Ohio: *Curd v. Wander*, 5 Ohio St. R., 92.

A mortgagee of chattels cannot recover in an action for alleged conversion thereof against a purchaser from the mortgagor in possession, when such a purchaser has sold and delivered the property to a third person, before default in payment of the mortgage, and before demand of possession by the mortgagee; although such mortgagee is empowered by the terms of the mortgage, which is duly filed, to take possession of the property at any time in case he deems himself unsafe: *Hathaway v. Brayman*, 42 N. Y., 322; *Hammill v. Gillespie*, 48 N. Y., 556.

A mortgagor of chattels has the right to make a general sale of whatever interest he owns.

A mortgagee of chattels may reserve the right to take possession of them if sold, but the right is optional, and the mortgagor is not in fault for not delivering the goods if they are not demanded: *Cadwell v. Pray*, 41 Mich., 308.

Where the mortgage is payable on demand, and contains a clause that, until default in the payment, the mortgagor should remain in possession of the property until demand and failure to pay, at least, if not until possession, the mortgagor has a leviable interest, the subject of execution and sale: *Liver v. Orser*, 5 Duer, 501; *Frisbee v. Langworthy*, 11 Wisc., 375.

A chattel mortgage which does not specify a time for payment is due immediately, and no demand for payment is necessary to sustain an action against a purchaser from the mortgagor upon it: *Dikeman v. Puckhafer*, 1 Abb. Pr., N.S., 33; *Baltes v. Ripp*, 1 Abb. Dec., 78, 3 Keyes, 210.

Whether a mortgagee can maintain an action against a sheriff levying upon property mortgaged by a mortgage payable on demand, without a demand of the mortgagor, and whether a mortgagor in possession under such mortgage has an interest which a sheriff may levy upon, *quere*: *Wisser v. O'Brien*, 35 N. Y. Superior Court Rep., 149.

The officer making the seizure and sale is not liable to the mortgagee, although he sell the property generally without in any way recognizing the lien of the mortgage, and deliver possession of it to the purchaser: *Hull v. Carnley*, 11 N. Y., 501.

Michigan: *Nelson v. Ferris*, 30 Mich., 497.

New York: *Hull v. Carnley*, 11 N. Y., 501, reversing 2 Duer, 99, 1 Abb. Pr., 158, 11 N. Y. Leg. Obs., 334, 17 N. Y., 202; *Manning v. Monaghan*, 28 N. Y., 585, 23 N. Y., 539, 1 Bosw., 459, 10 Bosw., 232; *Hammill v. Gillespie*, 48 N. Y., 556; *Guelet v. Asseler*, 22 N. Y., 225.

Wisconsin: See *Frisbee v. Langworthy*, 11 Wisc., 375; *Blakeslee v. Rossman*, 44 Wisc., 553.

Where the sheriff has a right to sell the interest of the mortgagor, and does so, of property which has no value except for actual consumption, which is difficult of identification, and which is distributed among various purchasers; query, as to whether the sheriff is liable to the mortgagee, and if so, to what rule of damages.

Michigan: *Nelson v. Ferris*, 30 Mich., 497.

New York: *Manning v. Monaghan*, 28 N. Y., 588, 10 Bosw., 232, 22 N. Y., 589, 1 Bosw., 459; *Guelet v. Asseler*, 22 N. Y., 225; *Berry v. Kelly*, 4 Rob., 127; *Hull v. Carnley*, 17 N. Y., 202; *Tefft v. Barton*, 4 Denio, 171.

See *Hale v. Omaha*, etc., 64 N. Y., 550.

If the mortgagor be in default, though the mortgagor's interest, if in possession, may be levied on and sold to the extent of his right to possess them, the chattels themselves cannot be sold on execution against him: *Haskins v. Kelly*, 1 Rob., 171; *Stewart v. Slater*, 6 Duer, 83, 96.

A sale upon execution of all the right, title and interest of the judgment debtor in chattels, covered by a mortgage void as to creditors, is a sale of all that is vendible upon the execution, and gives the purchaser all the creditor's rights as against the mortgagee: *Porter v. Parmley*, 52 N. Y., 185-190, 14 Abb., N.S., 16, reversing 43 How. Pr., 446, 13 Abb., N.S., 104.

See *Frisbee v. Langworthy*, 11 Wisc., 375.

The Farmers' Bank v. Cowan (2 Keyes,

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217, 2 Abb. Dec., 88) contains a *dicta*, that where the mortgage contained a clause that until default the possession of the mortgagor should be deemed that of the mortgagee, such clause, after forfeiture, made the possession by the mortgagor that of the mortgagee, so as to prevent a levy under process against the mortgagor; but this should be confined to cases where the mortgage is not attacked as fraudulent and void against creditors, because there was not a proper and actual change of possession: *Bullis v. Montgomery*, 50 N. Y., 352, affirming 3 Lans., 255; *Porter v. Parmley*, 52 N. Y., 189.

5. Where the mortgagee, in good faith, takes possession of the property under a clause in the instrument authorizing him to do so whenever he deems himself unsafe, the possessory right of the mortgagor terminates, and he has no remaining interest in the mortgaged property subject to levy and sale on execution.

Illinois: *Simmons v. Jenkins*, 76 Ills., 479.

New York: *Hall v. Sampson*, 35 N. Y., 274, reversing 19 How. Pr. R., 481; *Mattison v. Baucus*, 1 N. Y., 295; *Galen v. Brower*, 23 N. Y., 39; *Harris v. Murray*, 28 N. Y., 577; *Judson v. Easton*, 58 N. Y., 664; *Farmers' Bank v. Cowan*, 2 Keyes, 217, 2 Abb. Dec., 88; *Nichols v. Mead*, 2 Lansing, 222; *Huggans v. Fryer*, 1 Lansing, 276; *Stewart v. Slater*, 6 Duer, 83; *Gelhar v. Rose*, 1 Hilton, 117.

Where a chattel mortgage contained a clause, that in case "default should be made in the payment of said sum above mentioned," then it should be lawful for the mortgagee to take the property mortgaged, and until "default be made in the said sum of money" the mortgaged property should remain in peaceable possession of the mortgagor; held, it became so due on default in the payment of the first instalment (approving *Robinson v. Wilcox*, 2 N. Y. Leg. Obs., 160, and overruling *Parker v. Randal*, 5 N. Y. Leg. Obs., 418), and that the mortgagee might recover the mortgaged property, in an action of claim and delivery, from the sheriff, who had taken it on attachment against the mortgagor after default in several instalments: *Willis v. O'Brien*, 33 N. Y. Superior Ct. R., 536;

Halstead v. Swartz, 1 Thompson & Cooke, 559.

After default, the mortgagee's interest may be sold on execution against him: *Haskins v. Kelly*, 1 Rob., 171; *Ferguson v. Lee*, 9 Wend., 258.

After default has been made in the conditions of a chattel mortgage, the mortgagor has no interest in the mortgaged property except a mere equity of redemption.

New York: *Stoddard v. Denison*, 38 How. Pr., 296, 2 Sweeney, 54; *West v. Crary*, 47 N. Y., 423; *Hull v. Beebe*, 13 N. Y., 565; *Baltes v. Ripp*, 1 Abb. Dec., 78, 3 Keyes, 210; *Porter v. Parmley*, 52 N. Y., 188; *Bragleman v. Dane*, 69 N. Y., 69; *Olcott v. Tioga*, etc., 40 Barb., 180, affirmed 27 N. Y., 546; *Pratt v. Stiles*, 17 How. Pr., 211, 9 Abb. Pr., 150; *Haskins v. Kelly*, 1 Rob., 171; *Hall v. Ditson*, 5 Abb. N. C., 198, 55 How., 19; *Halstead v. Swartz*, 1 Thompson & Cooke, 559, 562; *Burdick v. McVanner*, 2 Den., 170; *Patchin v. Pierce*, 12 Wend., 61; *Bonaculich v. Poolman*, 3 Daly, 236.

Vermont: *Blodgett v. Blodgett*, 48 Verm., 32.

The mortgagor's right to redeem can only be extinguished by a *fair and bona fide* sale by the mortgagee: *Stoddard v. Denison*, 38 How. Pr., 296, 2 Sweeney, 54.

See *Hall v. Ditson*, 5 Abb. N. C., 198, 55 How. Pr., 19; *Hungate v. Reynolds*, 72 Ills., 425; *Halstead v. Swartz*, 1 Thompson & Cooke, 559; *Huggans v. Fryer*, 1 Lansing, 226.

The mortgagee has no right by any unfairness—i.e., by sale in bulk when he ought to sell in parcels—to sacrifice the property and deprive the mortgagor of a surplus over the debt, which by an openly conducted sale might arise. Remedy of mortgagor in such case: *Stoddard v. Denison*, 38 How. Pr., 296, 2 Sweeney, 54.

See *Hall v. Ditson*, 5 Abb. N. C., 198, 55 How. Pr., 19; *Hungate v. Reynolds*, 72 Ills., 425; *Halstead v. Swartz*, 1 Thompson & Cooke, 559; *Huggans v. Fryer*, 1 Lansing, 226.

The mortgagee may then keep the property without selling it under the mortgage, and in case he does so, if it be of sufficient value, it extinguishes the debt. But if it be of greater value than the amount of the debt, and there

is no sale, the mortgagor has no legal claim for the excess of such value.

He can, in that case, maintain no action for the property, or for any portion of its value. The sale becomes absolute for the payment of the debt, and no trust whatever enures in favor of the mortgagor. So that there is no fiduciary relation between mortgagor and mortgagee, and no trust except in the case of a surplus arising upon a sale under the mortgage: *Olcott v. Tioga R. R. Co.*, 40 Barb., 180, affirmed 17 N. Y., 546.

See *Hall v. Ditson*, 5 Abb. N. C., 98, 55 How. Pr., 19.

Where the mortgagee of personal property takes it into his possession for non-payment of the debt secured by the mortgage, the title is in him, and he is responsible for the property although it is subsequently taken from him by a third person. And if, after several months, he recovers possession of the property, and has it sold at auction by virtue of a power in the mortgage, and purchases it himself, the mortgagor is entitled to have its value, at the time the mortgagee first took possession, applied on the mortgage: *Pulver v. Richardson*, 3 Thompson & Cooke, 436.

When authorized to sell, the mortgagee may, in good faith, sell the mortgaged property at private sale, and extinguish the mortgagor's right of redemption: *Dane v. Ellis*, 16 Barb., 46; *Chamberlain v. Martin*, 43 Barb., 607; *Talman v. Smith*, 39 Barb., 390; *Ballou v. Cunningham*, 60 Barb., 425; *Huggans v. Fryer*, 1 Lansing, 276.

It has been held that at a public sale the mortgagee may himself bid upon the property and become the purchaser, discharged of any equity of redemption by the mortgagor: *Olcott v. Tioga*, etc., 27 N. Y., 546, affirming 40 Barb., 180; *Hall v. Ditson*, 5 Abb. N. C., 198, 55 How. Pr., 19.

See *Bryan v. Baldwin*, 7 Lansing, 174, 52 N. Y., 232.

And *per contra*, that a purchase by the mortgagee at a sale of chattels, at public auction, under a mortgage, is not such a purchase as bars the mortgagor's equity of redemption, or limits the amount at which the chattels should be applied on the mortgage, notwithstanding the mortgagor was present and bid on the property: *Story*

on Bailments, § 819; *Pulver v. Richardson*, 3 Thompson & Cooke, 436; *Buffalo*, etc., v. *Sun Mutual*, etc., 17 N. Y., 403; *Bryan v. Baldwin*, 52 N. Y., 235, affirming 7 Lansing, 174; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Colburn v. Morton*, 1 Abb. Dec., 378, 3 Keyes, 296; *Hawley v. Cramer*, 4 Cowen, 717, 736; *President*, etc., v. *Minot*, 4 Metc., 325.

But see *Lewis v. Graham*, 4 Abb. Pr., 106.

An action in equity lies to foreclose a chattel mortgage: *Briggs v. Oliver*, 68 N. Y., 336; 2 Sto. Eq., § 1217; *Ogden v. Lathrop*, 1 Sweeney, 647; *Hart v. Ten Eyck*, 2 Johns. Chy., 62, 100; *Costello v. City*, etc., 1 N. Y. Leg. Obs., 25, 26; 2 Hilliard on Mort., 420, 559; *Edwards on Bailments*, 248-262; *Story on Bail.*, §§ 308-310, 311-321; 2 Kent's Com., 581-2.

The decree in such a case could authorize the mortgagee to purchase, and when he desires such liberty, such a foreclosure should be resorted to.

If the mortgagee or other purchaser bid off the property at a public sale, the sum bid is conclusively established as the sum to be credited on the mortgage: *Olcott v. Tioga*, etc., 40 Barb., 180, affirmed 27 N. Y., 546.

A mortgage upon logs and lumber did not authorize the mortgagor to sell the property, but in effect provided that the lumber mortgaged, and that which should be manufactured from the logs, should be delivered to the mortgagees and received by them at a price which they had previously paid the mortgagor for such lumber, and the value thereof should be applied on the mortgage debt. Held that the mortgage was not fraudulent in law: *Johnsen v. Curtis*, 42 Barb., 588.

The mortgage of a chattel with power of sale by the mortgagee, upon default in payment, confers upon him no right to barter the mortgaged property, or to dispose of it otherwise than for cash: *Edwards v. Cottrell*, 43 Iowa, 194.

And, technically, a tender of the debt does not revert title to the mortgaged property in the mortgagor: *Hill v. Beebe*, 18 N. Y., 565; *Patchin v. Pierce*, 12 Wend., 61; *Hall v. Ditson*, 5 Abb. N. C., 198, 55 How., 19; *Blodgett v. Blodgett*, 48 Verm., 32; *Stoddard v. Denison*, 38 How. Pr., 298, 2 Sweeney, 54; *Porter v. Parmley*, 52 N. Y., 188;

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West v. Crary, 47 N. Y., 423; Hill v. Beebe, 18 N. Y., 565; Haskins v. Kelly, 1 Rob., 171; Halstead v. Swartz, 1 Thomp. & Cooke, 559; Olcott v. Tioga, etc., 40 Barb., 180, affirmed 27 N. Y., 546.

Though if the mortgagee accepts payment of the money secured by the mortgage, title reverts in the mortgagor: West v. Crary, 47 N. Y., 423; Patchin v. Pierce, 12 Wendell, 61; Thornton v. Cochran, 51 Ala., 415.

Not so, however, as to tender and acceptance of part of the amount due: Patchin v. Pierce, 12 Wend., 61.

A tender of the mortgage debt by the mortgagor remaining in possession after condition broken, kept good by payment of the money into court, is a good defence in an action by the mortgagee for possession: Musgat v. Pompelly, 46 Wisc., 660, 669, and cases cited.

See Hall v. Ditson, 5 Abb. N. C., 198, 55 How. Pr., 19.

In an action by the mortgagee of chattels, after forfeiture, against the

mortgagor, or a party having his rights, for the chattels, the mortgagee is not entitled to recover their full value, but is limited to the amount of the debt: Parish v. Wheeler, 22 N. Y., 494; Chadwick v. Lamb, 29 Barb., 518; Haskins v. Kelly, 1 Rob., 171.

See also Haskins v. Kelly, 1 Rob., 161.

Though if part of the property has been used up, the mortgagee may recover therefor up to the extent of his mortgage: Beers v. Waterbury, 8 Bosw., 396.

See Bragleman v. Dane, 69 N. Y., 69.

If the mortgagee, under the power of sale in the mortgage, sell portions of the mortgaged property beyond enough to pay the amount mentioned in the mortgage, the mortgagor may recover damages against him therefor: Charter v. Stevens, 3 Denio, 171; Haskins v. Kelly, 1 Rob., 171; Fitz Gerald v. Blocher, 82 Ark., 742.

See Bragleman v. Dane, 69 N. Y., 69; Blodgett v. Blodgett, 48 Verm., 83; Halstead v. Swartz, 1 Thomp. & Cooke, 559.

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M.R., Dec. 7, 1877.

TIPTON GREEN COLLIERY COMPANY V. TIPTON MOAT COLLIERY COMPANY.

[1876 T. 701.]

Mortgagor and Mortgagee—Redemption Decree—Mines—Mortgagee in Possession—"Just Allowances"—"Necessary Repairs"—"Permanent Improvements"—Cons. Ord. XXIII, r. 16.

In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances"; but, to entitle him to "permanent improvements," or "substantial repairs," he must make out a case for them at the trial.

THE plaintiffs in this action were the purchasers and the defendants the vendors of certain leasehold coal mines called the Moat Colliery, in Staffordshire, the purchase-money being payable by instalments under a deed of arrangement. The plaintiffs having made default in payment of one of the instalments, the defendants took possession of the colliery by way of enforcing their lien for the unpaid portion of the purchase-money, and proceeded to work the colliery on their own account.

*The plaintiffs then brought this action, claiming, [193
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amongst other things, that they should be allowed to redeem the colliery on payment of the unpaid balance of purchase-money and interest thereon, as though the defendants were mortgagees in possession under the powers of an ordinary mortgage deed, and that for that purpose all necessary accounts should be taken.

In their statement of defence the defendants submitted to account for profits made by them in working the colliery.

The action came on for trial on the 6th of August, 1876, when his Lordship made the "usual redemption decree" as against mortgagees in possession.

According to the minutes of decree as given out by the Registrar, the only accounts directed were, first, an account of what was due to the defendants for unpaid purchase-money, interest, and the costs of the action; and, secondly, an account of rents and profits received by the defendants; and it was ordered that upon the plaintiffs paying to the defendants what should be found due to them for unpaid purchase-money, interest, and costs, after deducting therefrom the amount of rents and profits received by the defendants, the defendants should re-surrender the colliery to the plaintiffs, or that, in default, the action should stand dismissed.

The defendants now moved that the minutes as so given out should be altered or varied by including (amongst other things) an account of what was due to the defendants for moneys expended by them "in necessary repairs or permanent improvements, or in the preservation" of the colliery.

No claim was made in the statement of defence for expenses of repairs or permanent improvements, nor was it proved at the trial that the defendants had incurred any such expenditure.

Chitty, Q.C., and *Russell Roberts*, for the motion: We are clearly entitled as mortgagees to "just allowances," even without any express direction in the decree: Cons. Ord. XXIII, r. 16. The question is whether "necessary repairs" and "permanent improvements" can be included under that head. As to the former, we submit that, as mortgagees in possession, we ought to be allowed expenses incurred in pre-194] serving the property *and so protecting our security: *Wilkes v. Saunton* ('). As to "permanent improvements," we admit that they cannot be allowed unless they are claimed and proved by the mortgagee at the trial, and specially mentioned in the decree: *Seton on Decrees* (*). With regard to ordinary repairs, it seems usual to mention them in the

(¹) *Ante*, p. 188.

(²) 3d ed., p. 383.

decree, *Powell v. Trotter* (1); Seton on Decrees (2), where the form is "necessary repairs and lasting improvements." "Just allowances" should be liberally construed: *Blackford v. Davis* (3).

Davey, Q.C., and *Phipson Beale*, for the plaintiffs: We submit that the minutes should remain unaltered. Whatever the defendants are entitled to they will get as a matter of course under the head of "just allowances." Permanent improvements they cannot get at all, as they now, in fact, admit, since they have made out no case for them by their defence.

JESSEL, M.R.: As I understand, the mortgagee in a redemption suit never has permanent improvements allowed unless he proves at the trial that there are some, and gets them inserted in the decree. The law is so stated in *Fisher on Mortgages* (4), where it is said that "to entitle a mortgagee to an inquiry as to money laid out in lasting improvements, he need not prove at the hearing what precise sums were so laid out; yet no inquiry will be granted on his bare allegation, without evidence that he has laid out money for the purpose." Mr. Fisher also says (5), and says correctly, that "the words 'all just allowances' in a decree, cover all payments to which the mortgagee is entitled under the terms of his security," except lasting improvements; and I think that necessary repairs are included in the words. As an authority for that, I will refer to Lord Langdale's judgment in *Sandon v. Hooper* (6), where he says: "The next question is, whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged *property, several cases have occurred at [195 different times, showing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for."

I am, therefore, clearly of opinion that under "just allowances," which are supposed to be in the decree, you will get necessary repairs. If you want anything else, such as improvements, or what are sometimes called "substantial repairs," you must ask for them; but then you must not only allege, but also prove them.

Therefore "permanent improvements" the defendants will

(1) 1 Dr. & Sm., 388.

(2) 8d ed., pp. 367, 396.

(3) Law Rep., 4 Ch., 304.

(4) 8d ed., p. 952.

(5) 6 Beav., 246.

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not get, but "necessary repairs" they will get, under "just allowances."

The first account directed by the decree may be "of what is due to the defendants for unpaid purchase-money and interest, or otherwise," which will carry everything; then it will go on in the usual way to provide for the costs of the action.

The decree will be dated as from to-day, and I shall give no costs of this motion to either party.

Solicitors for plaintiffs: *Whateley, Milward & Whitehead*, agents for Whateley & Co., Birmingham.

Solicitors for defendants: *Tucker & Lake*, agents for Wragge, Evans & Co., Birmingham.

[7 Chancery Division, 196.]

V.C.M., Dec. 21, 1877.

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*COX V. WATSON.

[1875 C. 144.]

Practice—Foreclosure absolute—Power of Attorney.

Under a decree for foreclosure an agent of the mortgagees attended at the place appointed for payment of the money, and during the whole of the appointed time, but without any power of attorney to receive the money. No one appeared on behalf of the mortgagors:

Held, that the foreclosure ought to be made absolute.

UNDER a foreclosure decree the place and time appointed for payment of the money found due were the Chapel of the Rolls Yard between twelve and one o'clock on the 18th of December, 1877. A clerk of the plaintiff's solicitor attended on behalf of the plaintiff on the 18th of December from twelve till one at the Rolls Chapel, but had no power of attorney to receive the money. No person appeared on behalf of the defendants.

Higgins, Q.C., and *Cadman Jones*, applied to make the foreclosure absolute. They referred to *Gurney v. Jackson* (1); *Anon.* (2); and *Lechmere v. Clamp* (3).

MALINS, V.C., held that as the mortgagors had not appeared they were in no way prejudiced by the omission of the plaintiff's agent to bring a power of attorney. The usual order for making the foreclosure absolute was therefore made.

Solicitors: *Goldring & Jukes*.

(1) 1 Sm. & G., app. xxvi.

(2) 1 Coll., 273.

(3) 31 Beav., 578.

[7 Chancery Division, 197.]

V.C.M., Dec. 7, 1877.

In re WOLVERTON MORTGAGED ESTATES. [197Will—Ambiguity—Parol Evidence.*

A testator left a legacy to the children of his daughter by any husband other than Mr. Thomas Fisher, of Bridge Street, Bath.

There was a Mr. Thomas Fisher, of Bridge Street, Bath, who was a married man.

There was also a Henry Tom Fisher, son of the above, who sometimes lived with his father :

Held, that although Mr. Thomas Fisher answered the description, and his son's name was not Thomas but Tom, parol evidence of the above circumstances might be admitted to show which was intended.

THOMAS PAWSEY, by his will, dated the 15th of August, 1867, bequeathed a sum of £600 to his executors upon trust to invest it, and to pay the income to his daughter Rosa Pawsey for her life, and on her death to hold the fund in trust for the children of Rosa Pawsey by any husband with whom she might intermarry "other than and except Mr. Thomas Fisher, of Bridge Street, Bath," and subject thereto for the testator's son Edwin Pawsey absolutely. At the date of the will there lived in Bridge Street, Bath, a Mr. Thomas Fisher, but he was a married man with a wife and family. The son of Thomas Fisher, whose name was Henry Tom Fisher, had paid his addresses to the testator's daughter; he was a commercial traveller, and was often at his father's house. After the testator's death, which happened in 1869, Rosa Pawsey married Henry Tom Fisher; the question in this petition was whether her child was entitled to the £600.

The fund having been paid into court under the Trustees Relief Act, a petition was presented by the executors of the will for payment of it out to them, and the petition was opposed on behalf of the child of Rosa Fisher, who claimed to be entitled to it.

Glasse, Q.C., and Campbell, for the petitioners: It is absurd to suppose that the testator meant to prevent his daughter marrying Mr. Thomas Fisher, a married man. If parol evidence can be admitted, we can show that Henry Tom Fisher, his son, was paying his addresses to the daughter, and that the *testator was opposed to his marry- [198 ing her, and that he must have been the person intended.

That parol evidence can be admitted in such a case is clear from *Charter v. Charter* ('). Roper on Legacies (') laid down the rule clearly.

(') *Law Rep.*, 7 H. L., 364; 12 Eng. R., 1.

(') Ed. 1847, p. 148.

MALINS, V.C., referred to *Gillett v. Gane* (¹), where the name prevailed over the description.

J. Pearson, Q.C., and Phear, for the infant child of Rosa Fisher: As there was in existence a Mr. Thomas Fisher who precisely corresponded with the description in the will, no parol evidence can be admitted to show that the person so named and described in the will was not the person really intended. This would be to create an ambiguity, when on the face of the instrument there is none: *Bernasconi v. Atkinson* (²).

MALINS, V.C.: The question here raised is singular, and not absolutely free from doubt. In all these cases some parol evidence is almost always more or less admissible in order to show the position of affairs, and to put the court in the position of the testator at the time of his death. In *Charter v. Charter* (³) Lord Cairns said: "In all cases of testamentary dispositions the court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied." The executors could not believe that Mr. Thomas Fisher, a married man, was really intended by the testator. What, then, could they do? They inquired further, and found a son of his, Henry Tom Fisher, who by the name of "Tom Fisher" was known to the testator. "Thomas" and "Tom" are generally forms of the same name, and though Tom was here the son's Christian name, [199] *the names of Thomas and of Tom being in reality only forms of the same name, it is necessary to adduce parol evidence of the state of circumstances in which the testator stood when he made his will to ascertain which of the two Fishers he meant; and to assume that he meant the father, Thomas Fisher, a man then of fifty years of age, with a wife and family, is ridiculous.

Tom Fisher had been paying attentions to the testator's daughter, and he strongly objected to her marriage with him. There, then, may be found a clue to the person intended by the testator when he spoke of Mr. Thomas Fisher. Then, again, the two Fishers had the same home, and it was quite competent for the executors to adduce parol evidence

(¹) Law Rep., 10 Eq., 29.

(²) 10 Hare, 345.

(³) Law Rep., 7 H. L., 377; 12 Eng. Rep., 1.

to prove which of those two persons was really within the testator's contemplation.

There appear to be practically two Thomas Fishers living in Bridge Street, though one was christened Tom and the other Thomas. I must take it as proved, that the testator meant Tom Fisher. The case comes within the reasonable rule that the court must find out who are the persons answering an ambiguous description. No doubt where one person accurately fulfils the description, and no one else does, you cannot admit parol evidence to show that such person was not intended; but here there are two persons who substantially, though not with perfect accuracy, come within the description of Thomas Fisher of Bridge Street.

A question very similar to the present was decided in *Charter v. Charter*, and in that case the conclusion was arrived at because, taking the whole will together, it was clear that the intention was to give the property to the son who resided with his mother, and therefore, though a son whose name was Forster was named, and there was a son living 100 miles away whose name was William Forster, the court held that another son whose name was Charles was intended. Under the very peculiar circumstances of this case, as there were two persons, as I consider, within the description in the will, to one of whom it was impossible that the testator's words could have applied, I think I shall not be going out of the rule if I admit the parol evidence, and I must hold that the infant respondents are not, and the petitioners are, entitled to the legacy.

Solicitors: *Clarke, Woodcock & Ryland; Prior, Bigg, Church & Adams.*

See 1 Eng. R., 260 note; 6 Eng. R., 620 note; 12 Eng. R., 21 note; *Yardley v. Holland*, 15 Eng. R., 423.

Equity will not reform a will, by changing its language or adding provisions to make it accord with the testator's intention; but, where its words permit, will give them a construction in accordance with such intention. Extrinsic evidence of the testator's intention is not admissible for the purpose of explaining, construing or adding to the terms of a will; but such intention must be ascertained from its words read in the light of the circumstances surrounding the testator when he made it.

Evidence of such surrounding circumstances is admissible where the will

contains inconsistent provisions; and also in case of a latent ambiguity. The complaint alleges, as to the will here in question, that the testator, at the time of making it, and thereafter until his death, owned lot 10 in a certain block; that the plaintiff at those times owned, and has ever since owned in fee simple, lot 9 in the same block; that by said will the testator devised said lot 10 to plaintiff, but that, in drawing the will, lot 10 was, by mistake, described as lot 9; that the will contained no other mention or description of said lot 10; and that at the time of the making of said will plaintiff was, and ever since has been, in the actual possession of said lot.

Held, on demurrer, that there is

nothing in the will, as thus described, upon which to base a construction of it as devising lot 10 to plaintiff.

The complaint also alleges that the misdescription of the lot devised to plaintiff is apparent on the face of the will; but it does not refer to any clause of the will which will support such an averment.

Held, that the averment is of a mere conclusion of law, and not confessed by the demurrer: *Sherwood v. Sherwood*, 45 Wisc., 857.

The Earl of Newburgh having estates in Sussex, Gloucester and elsewhere, gave instructions to his solicitor to prepare a will which was, *inter alia*, to give to his surviving countess a life estate in his estates in Sussex and Gloucester. The solicitor prepared a written will in conformity with his client's instructions, and laid it before, to be settled by, a no less eminent conveyancer than the late accomplished and learned Mr. Butler. In due time the will was returned by him, and having been fairly copied out was taken by the solicitor, having also with him the abstract of the will as originally prepared, to the earl. This only, and not the fair copy brought to be executed, was read, and as it represented that a life estate had been given to the countess in conformity with the earl's intention, as well in the Gloucester as the Sussex estate, he executed his will believing it to be in exact conformity with the abstract, and in that belief he died. It turned out that by some accident the word "Gloucester" had been struck out by the great conveyancer, and the person making the fair copy of the will not only omitted the word "Gloucester" but changed the word "counties" into "county," doubtless conceiving that he thereby carried out precisely the intention apparent in the draught. Thus the will was a total blank as to the "Gloucester" estate, which was worth nearly £14,000 a year. The consternation of all parties, but especially of the countess, conveyancer and solicitor may be imagined, and two suits (*Newburgh v. Newburgh*, 5 Madd., 364, 367) were forthwith instituted before the then Vice-Chancellor Sir John Leach—one by the new earl, for the execution of the trusts as they actually appeared on the face of the will and the other by the dowager

countess, praying that the mistaken omission of her life estate in the "Gloucester" estate might be rectified, and that the trust might be executed as so rectified. The Vice-Chancellor refused to admit the evidence tendered of that mistake, though on a rehearing it was shown by the distinguished conveyancer himself how the purely clerical error had been committed, and his refusal was sustained by the unanimous opinion, delivered by the late Lord Tenterden, of the judges summoned to assist the House of Lords, which decided in conformity with that view on a thoroughly established principle as to the non-admissibility of such evidence for such a purpose. It would render all written wills and instruments worthless, opening the door to those endless frauds and perjuries which it had been one great object of the Statute of Frauds to prevent. "To assume such a jurisdiction," said the court, "would be to repeal the Statute of Frauds in all cases of failure, by mistake or accident, to comply with it. To admit parol evidence under such circumstances of the deviser's intention it was the very object of the statute to prevent." *Heard's Cur. Reporters*, 173.

See also *Miller v. Travers*, 8 Bingham, 254.

B. owning the south half of lot two agreed, under seal, in 1859, with the defendant, his son, to let him have the east twenty acres in consideration of work done, and to convey it so soon as defendant should get it surveyed. In 1860 he, by his will, devised to his wife for life all that part of lot two "now owned by me," and to the defendant in fee "twenty acres of the east side of lot two which I do now own." The remainder of his estate at his wife's death he devised to his daughters, the plaintiffs, on condition of their supporting their brother E., who was not in his right mind. It appeared that two and a half acres of the lot had been sold by B., but whether conveyed or not was not shown, and that after the agreement defendant, with the others, had continued to live upon the lot as one family. The mother having died, the daughters claimed the twenty acres west of the easterly twenty acres, while the defendant contended that this passed under the devise to him, not the east twenty acres, of which he

was already entitled to a conveyance under the agreement.

Held, 1. That parol evidence was inadmissible that the twenty acres intended to be devised to defendant was the land in dispute.

2. That the plaintiffs were entitled to such land, for the defendant was wrong in his contention, and the devise to him was of the land which the testator had agreed to convey but had not conveyed to him: *O'Day v. Black*, 31 Upp. Can. Q. B., 38.

See also *Easter v. Severin*, 64 Ind., 375.

While in the construction of a will the general rule is, that the intention of the testator is to govern; it is the intention expressed by the will and not otherwise.

Declarations of a testator after the making of his will are admissible only in case of latent ambiguity, and then only from necessity, for the purpose of preventing the devise from being declared void for uncertainty.

If the terms of the devise can be applied to the subject matter with legal certainty without the aid of the declarations of the testator, such evidence is not admissible. To get at the intention expressed by the will, every clause and word are to be taken into consideration.

Where the devise was of "a lot of land in Newcastle known as the back field adjoining Deer Meadow brook; the eastern line of said lot to be a line run from the north line of my said farm at right angles with said north line, striking over the top of the hill so called," and there were two hills on the farm, the one claimed by the plaintiff being the more easterly, harmonizing with all the calls in the will, and the one claimed by the defendant, with a part only; held, that this was not a case of latent ambiguity, and that the hill claimed by the plaintiff was the monument intended, and that parol evidence of the declarations of the testator made after the execution of the will was properly excluded: *Cotton v. Smithwick*, 66 Maine, 360.

A testator devised to certain parties, "the 18 acres, more or less, that was deeded to me by the late Henry Buchner, senior, reference being had to the said deed for description." A deed conveying that quantity of land to the

testator was proved, but he had sold it long before the making of his will. He held, however, at the date of his will, about 21 acres under another deed from one Henry Buck, which he was in the habit of calling 18 acres, and which was the subject of dispute in the action.

Held, that the devise was void for uncertainty: *Buchner v. Buchner*, 6 Upp. Can. Q. B., 314.

See also *Lewis v. Owen*, 64 Ind., 446; *Tuxbury v. French*, 41 Mich., 7.

In construing a will, all doubts must be resolved in favor of the testator's having said exactly what he means.

A gift to the children of A. and B. (they being persons who could not have offspring jointly) must be construed according to the plain grammatical sense of the words used, and constitutes a gift to B. himself and to the children of A.

In construing a will, extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, is admissible for the purpose of enabling the court to understand the meaning and application of the words he has used, but not for the purpose of showing an intention inconsistent with the words of the will.

Extrinsic evidence is also admissible in cases of latent ambiguity, where there are two or more persons or things exactly answering the person or thing described in the will. In such cases parol evidence may be received of what the testator said, to show which of them he meant, but not to show that he meant a person or thing different from the one mentioned in the will.

Under a bequest or devise to a certain person, and to the children of a certain other person, the donees take *per capita* and not *per stirpes*: *Burnet v. Burnet*, 30 N. J. Eq. R., 595.

See also *Tuxbury v. French*, 41 Mich., 7.

In the interpretation of a will, extrinsic evidence of surrounding circumstances, to show what a testator intended by his will, is admissible; but declarations by the testator of what he intended by his will, will not be received for that purpose: *Davidson v. Boomer*, 15 Grant's (U.C.) Chy., 218; *Tuxbury v. French*, 41 Mich., 7.

Where a testator, in making his will, made mistakes in the description of

several tracts of land attempted to be devised, some of the tracts not being described, and in several cases other and different lands were named, and made his widow residuary devisee "of all the rest and residue" of his "estate remaining at the time of" his "decease, real and personal and mixed, of every name and description whatsoever," it was held, that as the widow would, under such will, take all lands which failed to pass, through the mistake, she had a right to correct the mistake by conveying the lands to the proper parties, or to have the mistake corrected on bill filed by her for that purpose.

Where the residuary devisee in a will files a bill in equity to have mistakes in the will corrected, the effect of which is to deprive her of lands she would otherwise take under the same, a decree may pass as prayed without the hearing of any proof whatever of the fact of mistake having been made, and the minor heirs of the testator, in such case having no interest in the lands thus taken from the complainant, cannot be heard to complain of the decree reforming the will: *Worrell v. Patten*, 69 Ill., 254.

On a trial of the issue *devisavit vel non*, a paper, purporting to have been executed as a will years anterior to the date of the will in contest, was offered in evidence to show by the written declarations of the testator his intentions as to the disposition of his property.

Held, that such evidence might be received, and that the instrument containing such declarations of intention, although it be clothed in the language and form of a testamentary act, need not be proved with all the strictness required to establish a will. For the purpose of such evidence proof of the handwriting alone is sufficient: *Demonbreun v. Walker*, 4 Baxt. (Tenn.), 199.

1. Extrinsic evidence of the circumstances, situation and surroundings of the testator and of his property, is legitimate to place the court which expounds the will in the situation of the testator who made it, and thus enable the court to understand the meaning and application of the language he has adopted; but the testator's intention must ultimately be determined from the language of the instrument as explained by such extrinsic evidence, and

no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself.

2. The only exception to the foregoing rule is, that the declaration of the testator may be resorted to in case of a latent ambiguity which arises where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event parol evidence of what the testator said may lawfully be adduced to show which of them he intended, but such evidence will not be allowed to show that he meant a thing different from that disclosed in the will.

3. The testimony of the scrivener who drew the will, that the testator came to his office with the items on a piece of paper for each son, that he had these premises marked on it, "my Cropwell farm, containing eighty-five acres," and that the words "conveyed to me by the heirs of my deceased wife" were not on that paper, but were inserted in the will by the scrivener as his own language, which he used as an additional description to distinguish the premises from the testator's other property, is illegal.

4. Where, in a deed or will, words of indefinite signification are used, as *my farm and plantation*, and there is nothing on the face of the instrument to qualify them, or limit and apply them to a particular subject matter, evidence of extrinsic circumstances, matters of fact, as distinguished from mere declarations of intention, is inadmissible for the purpose of ascertaining in what sense such indefinite language was used. The office of such testimony is that of interpretation—to find out the true sense of the written words as the parties used them. Where such evidence is received, and the facts are either admitted or found by the jury, the intention of the parties is to be determined by a construction by the court from the language of the entire instrument, after the sense of such general words has been ascertained by the extrinsic proof.

5. Whenever the intention of the testator to give the whole as an entirety clearly appears from the language of the will, whether such intention is expressed by a designation by a name, or by abutments or other descriptive words,

additional words of description which prove to be only partially true will be rejected as a mistaken description on the maxim, *falsa demonstratio non nocet*.

6. But it is an erroneous application of the maxim *falsa demonstratio non nocet*, to suppose that an enumeration of particulars in the description will in all cases be overruled by general language in the devise. On the contrary, where there is a clear enumeration of particulars purporting on their face to be designed as qualifications of a preceding general description, words of general devise must yield.

7. The question whether language purporting to be descriptive is a false demonstration, and to be rejected as such, or a true restriction of the more comprehensive words of general devise, is one of construction from the language of the will to ascertain at what period, in the descriptive words, the description of the premises intended is complete, and what phrases or expressions are merely superfluous.

8. The distinction is between those cases in which there has been a complete description of the thing given and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected with it as to form part of the description of the thing given.

9. Another rule of construction is, that if there be a subjected matter wherein all the demonstrations are true, and another wherein part are true and part false, the words then shall be intended words of true limitation to pass only those lands where all these circumstances are true. The operation of this rule is to qualify words of a general and more extensive signification by the additional words of limitation. It is also a necessary sequence from this rule that where the description consists of several particulars of different degrees of importance, that subject matter will be selected to which those particulars apply, which are superior in number or importance, rather than that which corresponds with those of a lesser number or of minor consequence.

10. Devise of "all that my farm plantation near Cropwell, conveyed to me by the heirs of my deceased wife,

and where my son Thomas now resides, containing about eighty-five acres, more or less." The testator owned two parcels of land near Cropwell—the one containing seventy-two and sixty-two hundredths acres, which had been conveyed to him by the heirs of his deceased wife, the other containing fourteen and seventy-three hundredths acres, which had been conveyed to him by one Abel Lippencott: these two parcels adjoining each other—and had been rented and cultivated together and used both.

Held, that only those premises which had been conveyed to the testator by the heirs of his deceased wife, passed under the devise: *Griscom v. Evens*, 40 N. J. L. R., 402.

W. devised to his daughter T. six acres off the "northwest portion of lot twenty in the third concession of Haldimand," to be chosen by his executors, and "to extend twenty rods in width, joining the northern line of said lot twenty, and extending as far south as will comprise six acres aforesaid."

One B. owned a strip at the northwest corner of the lot, extending twenty rods in width to the east, the whole lot being eighty rods wide, and this strip had for forty years been inclosed and occupied. The executors chose the six acres for T. adjoining this and extending twenty rods east. Afterwards, on a survey made under Consol. Stat. U. C., ch. 93, sec. 11, the northwest angle of lot twenty was placed four rods further west, and defendants, who owned the remainder of lot twenty, then contended that T. must lose that width off the east side of her strip, as the devise restricted her to the "northwest portion" of the lot, and she could not, therefore, come beyond the centre into the northeast part, although she could not otherwise get more than sixteen rods in width, B. having acquired a title by possession, so that his eastern fence could not be moved.

Held, however, that the intention of the testator was to give six acres, twenty rods in width, along the northern boundary of the lot without reference to the strict meaning of the words "northwest portion;" that the executors had therefore chosen the land in accordance with the will, and that defendants, having trespassed thereon,

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were liable: *Tucker v. Phillips*, 24 Upp. Can. Q. B. Rep., 626.

Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in mortmain whereon it was to be built, extrinsic evidence was given to show that land for the site of a parsonage had already been given by a third person, and that the testator had on various occasions pointed it out as the site for a parsonage, and had avoided building a school house upon it, lest doing so should interfere with its use for a parsonage—such evidence was received to rebut the presumption that would otherwise arise from the generality of the bequest, that the money bequeathed was to be applied in the purchase of land for a site as well as for the erection of the building: *Davidson v. Boomer*, 15 Grant's Chy., 218.

Where words in a will are fairly and legitimately applicable to one thing as its name, and are equally applicable to another thing as words of description, parol evidence is admissible to show in which of the two senses the testator was in the habit of using the words.

Where a testator owned two adjoining farms, which had been for many years cultivated and managed as separate and distinct farms, and were known and designated by him by different names, the farm on which he resided, and which was cultivated by him, being called by him the "Home Farm," and the other, which was cultivated by tenants, the "Jo. Boyd Farm," but for several years not preceding the date of his will these farms had been managed and cultivated by an agent of the testator as one farm, without regard to the division line between them; and the testator, by his will, devised his "home farm" to his wife. Held, that parol evidence was admissible to prove that the testator was in the habit, as well after the two farms had become so united in their management, as before, and down to the time of making his will, of calling the two farms by their former names, designating the one on which he resided as the "Home Farm," and the other as the "Jo. Boyd Farm."

Held, also, that it was not error in the court to instruct the jury that it was for them to decide in which of the

two senses the testator used words "home farm," whether as designating the old home farm, or the entire, composed of the two thus united: *Boggs v. Taylor*, 26 Ohio St. Rep., 604.

See also *Clapsaddle v. Eberly*, 2 Leg. Chron., 256, 2 Week. Notes (Penn.), 2.

Where there is nothing to raise a doubt as to the identity of the persons through whom a title comes, it will be presumed from the identity of the names. In this case, however, to confirm the identity there were besides the names the description of the parties and the handwriting, and the fact that the patent had been handed down with the different conveyances, and it appeared further that both parties assented to the title of one M. who claimed through the deeds, as to which proof of identity was insisted upon.

The land claimed was in the township of East Flamborough, and the will through which the plaintiff claimed, devised all the testator's land in "Flamborough." There were two townships, called respectively East and West Flamborough, and none called Flamborough; but it was proved that the testator owned this land, and not shown that he had any other land in either East or West Flamborough. Held, that this land might pass by the devise: *Nicholson v. Burkholder*, 21 Upp. Can. Q. B., 108.

A testator directed his trustees to set apart and invest £1,000, and to stand possessed thereof, and the income thereof, in trust for Y. for life, and after his death "in trust for his daughter, my godchild, for her sole and separate use." Y. at the date of the will and the testator's death had a son, the petitioner, who was the godchild of the testator, and a daughter who was married. The testator had not been sponsor to any of Y.'s children except the petitioner, and had left legacies to several other godchildren of his, and was on intimate terms with the petitioner, but not with his sister.

Held, that the petitioner was entitled to the legacy, the leading motive of the bequest appearing to be that he was the testator's godchild: In matter of 11 & 12 Vict. c. 68, and of the Will of Cadwallader Lord Blayney, &c., 9 Irish Eq., 413.

A testatrix bequeathed a legacy to a niece, whom she described as "Mo-

nimia Mahon, daughter of my brother Walter," and it appeared that the only daughter of Walter named Monimia had been married to a person named Smith, and was deceased at the date of the bequest, as the testatrix was aware, but that the testatrix had another niece named Monimia Mahon, who survived her.

This lady, however, was not a daughter of Walter.

Held that, notwithstanding the inaccuracy of the description of the legatee, the testatrix had indicated with sufficient certainty that the legacy was intended for the niece Monimia who survived her: *Dooley v. Mahon*, Irish R., 11 Eq., 299.

A bequest to the "Home Mission Society," construed as a bequest to the "American Home Missionary Society," upon proof of facts, outside of the will, showing that that society must have been the one intended, and there being no society of the former name: *Beardsley v. American*, etc., 45 Conn., 327.

See also *Dunham v. Averill*, 45 Conn., 61.

The words, "The said fourth schedule," in a will, held to mean "the said fifth schedule," upon a consideration of all the provisions of the will and of the state of the testator's property and family when the will was made, although the actual words involved no contradiction nor repugnancy to the other provisions of the will, except by making in one instance insufficient provision for the charges thereby created, having regard to the value of the property, and except by making capricious and improbable dispositions, at variance with what appeared to be the general intention: *Hart v. Tulk*, 22 De Gex, Mac. & Gord., 299.

Where no sum was named in a bequest, but in a subsequent clause that bequest was spoken of as the "said" bequest of 1,000 pounds, held that the latter clause was evidence that the testator intended a bequest of 1,000

pounds in the bequest in which no sum was named: *Edmunds v. Waugh*, 4 Drewry, 275.

So, where words make a clause inconsistent with, and repugnant to, itself, they ought to be disregarded: *Wilson v. Wilson*, 15 Sim., 486.

The owner of the west half of a lot of land, supposing himself to be the owner of the east half, and not the west half, entered into a contract with the owner of other lands to exchange for these the east half, and the east half was conveyed accordingly. He filed a bill to compel the other party to the agreement to accept a conveyance of the west half, and specifically perform the contract entered into between them by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west," and it appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either; but as the contract was for the east half, and the mistake was that of the plaintiff alone, the court held that the west half could not be substituted for the east half, and refused the relief asked: *Cottingham v. Boulton*, 6 Grant's Chy. Rep., 186.

A., being in possession of the east half of a lot, claiming title thereto, executed a mortgage on the west half. On a bill against the heir of A., to reform the mortgage by substituting the east half for the west half, it was shown that A. had no claim to the west half, and that that portion of the lot was an improved farm, of which others had, for many years, been in possession. The defendant neither admitted nor denied the mistake.

Held, that the mistake was sufficiently established to entitle the plaintiff to a decree for reforming the mortgage: *White v. Haight*, 11 Grant's Chy. Rep., 420.

See, however, *Euste v. Severin*, 64 Ind., 875.

[7 Chancery Division, 200.]

V.C.M., Dec. 7, 1877.

200]

In re MELLOR'S POLICY TRUSTS.Married Women's Property Act (33 & 34 Vict. c. 93), s. 10—Policy of Assurance—Distribution on Death of Husband—Form of Order.*

A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act.

The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate.

IN this case (¹) an application was now made that the moneys received under the policy which had been effected by William Mellor, deceased, "for the benefit of his wife and children," might be applied according to the provisions of the Statute of Distributions, as if William Mellor had died intestate.

The application was supported by an affidavit showing that the husband had died insolvent, and that the income of the money to be received under the policy would be inadequate for the maintenance of the wife and children.

Oswald, for the petition, referred to *Sanderson v. Sanderson*, before his Lordship, June 8, 1877.

Freeling (*amicus curiæ*) said that Lord Romilly, M.R., had frequently inserted in settlements made by the court on married women and their children a provision that the trustees might, with the consent of the court, raise a sum for the advancement of the married woman.

MALINS, V.C., referred to the 10th section of the Married Women's Property Act, 1870, and held that he could interpret the provision in that section, which requires in such cases that the money is to be held "in trust for the wife for her separate use," as meaning that it was to be held for her separate use as against a husband so long as the woman was married, and that it did not mean that a woman formerly married, but whose husband was dead, could not take a part of the capital with the sanction of the court.

As the applicant was a widow, and proved to be in poor circumstances, he should hold that the money might be distributed as in the case of an intestacy.

Solicitors: *Layton & Jaques*.

(¹) 6 Ch. D., 127; 22 Eng. R., 700.

[7 Chancery Division, 201.]

V.C.M., Dec. 8, 1877.

In re WHITE AND HINDLE'S CONTRACT.*Rule in Shelley's Case—Deed and Will—Legal and Equitable Estate.*

The principles governing the application of the rule in *Shelley's Case* are the same in the case of wills as in the case of deeds.

Remarks on *Cooper v. Kynock* ⁽¹⁾ and *Crofts v. Middleton* ⁽²⁾.

ADJOURNED SUMMONS. The question raised was whether the rule in *Shelley's Case* applied to the following limitations in a will so as to give Elizabeth Ann White an estate in fee.

The property devised was subject to a mortgage, and the devise was therefore of an equitable estate.

The material limitations were as follows: "To the use of trustees, their executors and administrators, during the life of E. A. White, upon trust for E. A. White for her separate use, and after her decease, in case W. W. White should survive her, to the use of W. W. White for life, and after the decease of E. A. White and W. W. White, to the use of Rose Edmunds if she should be living at the decease of her mother, and to her heirs and assigns forever, and in case Rose Edmunds should die in the lifetime of her mother, to the use of such persons as E. A. White should by will appoint, and in default of appointment, to the use of the heirs of E. A. White forever."

It was contended on the part of the vendors, under a contract for sale of the property, that E. A. White took an estate in fee under the above limitations (subject to the intermediate estates), and on the part of the purchasers that she did not take such *estate on the ground, 1, that [202 the limitation to her heirs was not by way of remainder, but of an executory devise or shifting use; and, 2, that the limitation to E. A. White for life being equitable in form, and that to her heirs being legal in form, the rule in *Shelley's Case* did not apply.

J. Pearson, Q.C., and Macnaghten, for the purchasers: This is the case of a will and not a deed, and therefore the intention of the testator may be looked at. If that be so, it is clear in this case that the intention was to give E. A. White a trust estate only for life, with an ultimate contingent interest in her heirs. In the ultimate limitation only "heirs" of E. A. White are named, though the gift to Rose Ed-

⁽¹⁾ Law Rep., 7 Ch., 398.

⁽²⁾ 2 K. & J., 194.

munds is to her, her heirs and assigns. The intention being thus made out, the equitable gift for life ought not in a will to coalesce with the remainder to the heirs, which is legal in terms, though by the accident of the outstanding mortgage all the limitations have become equitable.

In *Cooper v. Kynock* (*), which was a similar case on a deed, it was said that the construction might have been otherwise on a will.

Crofts v. Middleton (†) was a case of a will, and the life estate and a contingent remainder to heirs was held not to coalesce.

[They also referred to Fearn on Contingent Remainders (*); *Plunkett v. Holmes* (†).] And the rule in *Shelley's Case* does not apply where the limitation to the heirs is by way of an executory interest: Theobald on Wills (*).

Higgins, Q.C., and *Whitehorne*, for the vendor, were not heard.

MALINS, V.C.: In this case the rule in *Shelley's Case* applies, as all the limitations are equitable. I am not aware that there is any difference whatever in the application of the rule in *Shelley's Case* to a deed and to a will. It is stated in the report of *Cooper v. Kynock* that the construction might have been otherwise in a will, but this statement 203] *has reference to the estate in fee taken by the trustees, and not to the application of the rule in *Shelley's Case*. As to *Crofts v. Middleton* (†), I am unable to agree with the judgment of Vice-Chancellor Wood, that there was not an immediate fee simple given in that case, and this point was not decided on the appeal. As regards the argument that the rule in *Shelley's Case* does not apply where the gift to heirs is by way of an executory or conditional limitation, I should be slow to admit such a doctrine if the question came before me; but in the present case I have no doubt that the limitations are contingent remainders and not executory or conditional limitations. The summons must therefore be decided in favor of the vendor.

Solicitors: *Cookson, Wainwright & Pennington*; *Lewis, Munns & Longden*.

(*) Law Rep., 7 Ch., 398.

(†) 2 K. & J., 194; 8 D. M. & G., 192.

(*) Pages 276, 341.

(*) 1 Lev., 11.

(†) Page 218.

[7 Chancery Division, 204.]

V.C.B., Nov. 9, 1877.

**In re Cox.*

[204

COX V. DAVIE.

[1876 C. 80.]

Will—Construction—Charitable Bequest—Mortmain.

A bequest to the corporation of T. of a sum of £3,000 Consols, of which £1,000 was to be expended "in the erection of a dispensary, which is so urgently needed there," and the remaining £2,000 to be invested as "an endowment fund for the said dispensary":

Held, void under 9 Geo. 2, c. 36, although the corporation held land in mortmain at T. which was available for the purposes of the bequest.

WILLIAM SANDS COX, by his will, dated the 3d of February, 1875, after making numerous charitable bequests (including funds for the building of an hospital and several dispensaries), bequeathed "to the mayor and town councillors for the time being of Tamworth the sum of £3,000 £3 per Cent. Consolidated Annuities;" and directed that the sum of £1,000 Consols, part of the said sum of £3,000 Consols, should be expended by them "in the erection of a plain, simple building as a dispensary, which is so urgently needed there;" and that the sum of £2,000 Consols, the residue of the said sum of £3,000 Consols, should be held by them "as an endowment fund for the said dispensary," and invested in such names as they should think fit, and the dividends thereof should from time to time be applied towards the support of the said dispensary.

The will contained a direction that no lands should be purchased or buildings erected out of the aforesaid sums given for the purpose of endowing the said hospital and dispensaries, or any or either of them.

The testator died in December, 1875, and this action was instituted in February, 1876, for the administration of his estate. The cause now came on to be heard on further consideration, a question being raised whether the above bequest to the corporation of Tamworth was within the statute 9 Geo. 2, c. 36.

There was evidence that the corporation had power under their charters to acquire and hold land in mortmain for the erection of *hospitals, and had land at Tamworth [205 available for the purposes of the bequest.

Russell Roberts, for the plaintiff.

Sir H. Jackson, Q.C., and *Rowden*, for the next of kin,

who were desirous that the testator's intentions should be carried into effect, if possible, did not oppose.

Bevir, Q.C., and *Dickens*, for another charity, and also for a residuary legatee, did not oppose.

E. W. Byrne, (*Hemming*, Q.C., with him), for the corporation of Tamworth: No doubt the rule of construction is that a direction to build includes a direction to purchase land for the purpose of building, but the rule does not of necessity apply if the testator distinctly points to some land already in mortmain, or if the land can be obtained otherwise than by purchase through the gift of the testator: *Philpott v. St. George's Hospital* ⁽¹⁾; *Attorney-General v. Davies* ⁽²⁾; *Attorney-General v. Whitchurch* ⁽³⁾; *Giblett v. Hobson* ⁽⁴⁾.

The testator knew all about the corporation of Tamworth, and the inference is that he also knew the corporation held land in mortmain upon which they could build a dispensary. The court will always construe a charitable bequest favorably if the legatee has land in mortmain already in possession upon which the gift can operate: *Cresswell v. Cresswell* ⁽⁵⁾. In *Booth v. Carter* ⁽⁶⁾ a bequest to the trustees of a particular chapel in C., to be applied towards the erection of a new chapel in C., was upheld, the trustees having land at C. in mortmain on which a new chapel could be built; and in *Sewell v. Crewe-Read* ⁽⁷⁾ a legacy to be applied in building a parsonage house was held good, there being glebe land belonging to the living upon which a house could be built. In this gift the words "which are so urgently needed 206] there" sufficiently *point out, I submit, the land upon which the building was to be erected, and that the testator clearly intended the £1,000 to be laid out by the corporation in building simply upon some of their land at Tamworth which was available for the purpose. At any rate, if the building fund fails, the endowment fund does not necessarily fail with it: *University of London v. Yarrow* ⁽⁸⁾; *Sinnett v. Herbert* ⁽⁹⁾.

Kay, Q.C., and *Woodroffe*, for the executors, and also for some residuary legatees not before the court: The direction in the will that the moneys given for endowment should not be laid out in purchasing land or erecting buildings affords a strong presumption that the testator did intend land to be purchased as a site for a dispensary.

⁽¹⁾ 6 H. L. C., 338.

⁽²⁾ 9 Ves., 535.

⁽³⁾ 3 Ves., 141.

⁽⁴⁾ 3 My. & K., 517.

⁽⁵⁾ Law Rep., 6 Eq., 69.

⁽⁶⁾ Law Rep., 3 Eq., 757.

⁽⁷⁾ Law Rep., 3 Eq., 60.

⁽⁸⁾ 1 De G. & J., 72.

⁽⁹⁾ Law Rep., 7 Ch., 232.

Further, the rule of construction, as laid down by Vice-Chancellor Wickens in *Pratt v. Harvey* (¹), is settled law, that in order to validate a gift of this kind you must find in the will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given to the acquisition of land: *Attorney-General v. Tyndall* (²); *Attorney-General v. Davies* (³); *Giblett v. Hobson* (⁴); *Dunn v. Bownas* (⁵); *Smith v. Oliver* (⁶); *Tatham v. Drummond* (⁷); *Pritchard v. Arbouin* (⁸); *Mather v. Scott* (⁹). In *Philpott v. St. George's Hospital* (¹⁰) there was an express direction that the money should not be laid out in the purchase of land. Then *Booth v. Carter* (¹¹) was not followed by Vice-Chancellor Malins in *In re Watmough's Trusts* (¹²). In *Sewell v. Crewe-Read* (¹³) evidence was admitted to prove that the testator pointed to a particular piece of land; and in *Cresswell v. Cresswell* (¹⁴) Vice-Chancellor Giffard held that there was a sufficient indication of the land on which the building was to be erected. None of those circumstances *exist in this case. The gift therefore fails, and as [207 the primary object fails, the secondary object, the endowment, also fails: *Smith v. Oliver* (⁶); *Dunn v. Bownas* (⁵).

Rigby, for other charities, adopted Mr. Kay's argument. *E. W. Byrne*, in reply.

BACON, V.C.: No doubt the temptation is very strong indeed to uphold this charitable bequest, but I am not at liberty to yield to any such temptation as may be presented to me. I have only to administer the law as I find it. The Statute of Mortmain (9 Geo. 2, c. 36) has been frequently under discussion and commented upon in various courts, and from the earliest time when any decision has been pronounced upon it, it seems to have been established that that rule which is mentioned in *Philpott v. St. George's Hospital* (¹⁰), and more distinctly enunciated in the case of *Pratt v. Harvey* (¹) before Vice-Chancellor Wickens, has been the rule of all the decisions. To take it out of the Statute of Mortmain the gift must be to build upon land which is indicated, or there must be a prohibition as to laying out the money devoted to that purpose to any other. That is the principle

(¹) Law Rep., 12 Eq., 544.

(²) Amb., 614.

(³) 9 Ves., 535.

(⁴) 3 My. & K., 517.

(⁵) 1 K. & J., 596.

(⁶) 11 Beav., 481.

(⁷) 4 D. J. & S., 484.

(⁸) 3 Russ., 456.

(⁹) 2 Keen, 172.

(¹⁰) 6 H. L. C., 388.

(¹¹) Law Rep., 3 Eq., 757.

(¹²) Law Rep., 3 Eq., 272.

(¹³) Law Rep., 3 Eq., 60.

(¹⁴) Law Rep., 6 Eq., 69.

(¹⁵) 3 Ves., 141.

of all the decisions. The two cases before the Master of the Rolls do not impeach that rule in the slightest degree. In *Booth v. Carter* ⁽¹⁾ the new chapel seems to have been held to be a mere substitution for an old one. In the other case, *Sewell v. Crewe-Read* ⁽²⁾, the Master of the Rolls, as a matter of construction, held that the letter of the testator enabled the court to come to the conclusion pronounced in the judgment, although in the former case the learned judge said it was carrying it a shade further than was ever done before. The case of *Philpott v. St. George's Hospital* is one of the most important on this subject—important in itself, and still more important because by very patient and learned judges all the authorities then extant were considered and commented upon, and in that case the rule is 208] *stated in the most distinct manner that can be conceived, namely, either the land must be so indicated as that you can say that it is not within the Statute of Mortmain, or the direction must be that you must not lay out the amount of the legacy upon any other land than that which is already in mortmain. The case which has most occupied my attention is that of *Cresswell v. Cresswell* ⁽³⁾, which comes nearest to the present case, and if I could follow it so as to prevent the application of the rule, I do not hesitate to say I should be very glad to do so; but when that is examined, that must also be treated as a question of construction. The learned judge, aware of the rule, not intending to depart from it, knowing all the authorities upon the subject, found out by the expressions used in connection with the church or other surrounding circumstances, that he was able to say the land had been indicated.

Now the words in this will point to purchase. It is not enough to say that the town council have already lands in mortmain, because the direction in the will is that, out of the legacy of £3,000, £1,000 is to be expended by them in erecting a building "as a dispensary, which is so urgently needed there." It has been held that a direction to erect a building contains in it also a direction or authority to purchase, and even if that were not so plain as it is upon the authorities, it is very plain upon this will, because in that passage to which my attention has been drawn the testator seems to say that he meant land to be purchased. He says: "I direct that no lands shall be purchased or buildings erected out of the aforesaid sums given for the purpose of endowing the said hospital and dispensaries." The authority, therefore, is to lay out in the purchase of land all that

⁽¹⁾ Law Rep., 3 Eq., 757. ⁽²⁾ Law Rep., 3 Eq., 60. ⁽³⁾ Law Rep., 6 Eq., 69.

was not dedicated to the endowment of which he speaks. In the face of the authorities I have no alternative but to see that those rules laid down as applicable to such like bequests must be at all times adhered to, and those rules have the effect of invalidating this legacy.

Then with regard to the question as to the £1,000 being for erecting the building, and the £2,000 for endowing it, that has been abundantly covered by decision. The gift being for £3,000, divided into two sums of £1,000 and £2,000 for the purposes there mentioned, I cannot uphold the endowment fund, as it is called, *even although the [209 municipal officers of Tamworth may have erected a dispensary; but I cannot hesitate to say I am very sorry that I am obliged to decide by force of the authorities against what is the plain intention of this testator.

Solicitors for plaintiff: *Kennedy, Hughes & Kennedy.*

Solicitors for corporation of Tamworth: *F. J. & G. J. Braikenridge.*

Solicitors for other parties: *J. G. Brownlow; Peacock & Goddard.*

[7 Chancery Division, 210.]

V.C.H., Nov. 14, 15, 1877.

*YEATMAN V. YEATMAN.

[210

[1876 Y. 7.]

Administration—Legal Personal Representative—Refusal to sue—Action by Residuary Legatee.

Mere refusal by a legal personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the legal personal representative and the alleged debtor to the estate.

Bowsher v. Watkins (1) and *Hilliard v. Eiffe* (2) commented on.

The circumstances which would suffice to induce the court to answer in the affirmative an inquiry whether proceedings ought to be instituted, will in general suffice to entitle a person beneficially interested to sue in his own name.

THE late Mr. F. F. Yeatman, who carried on, in partnership with his son, Christopher Yeatman, the business of a wine merchant at Boston, in the county of Lincoln, by his will, dated the 3d of March, 1863, after appointing his sons, the defendants, F. F. Yeatman and Christopher Yeatman, executors of his will, and bequeathing to his wife, Caroline Yeatman, the lease of his house, vaults, and premises for her life, she permitting their son Christopher to occupy the business premises, directed his said son to carry on the busi-

(1) 1 Russ. & My., 277.

(2) Law Rep., 7 H. L., 39; 9 Eng. R., 27.

ness, and to divide the profits thereof equally between himself and the said Caroline Yeatman during her life (making a yearly statement of such profits), and gave him liberty to retain and employ in the business the capital employed therein, save such part thereof as might be required for the payment of the debts and legacies thereafter directed to be paid. The testator also directed that interest on the capital so employed after the rate of 3 per cent. per annum should be paid to his wife before any division of profits should be made, and provided that on the death of his wife the business should be carried on by, and the profits divided between, his sons Christopher and F. F., unless the latter son failed to comply with certain conditions, in which case he was to receive a fixed sum; and after giving pecuniary legacies, the testator directed his trustees to sell his residuary personal estate, and apply the proceeds for the purposes aforesaid, directing that any deficiency should be raised and paid by his son Christopher out of the capital allowed to remain in the business.

The testator died in November, 1866, and after his death the business was carried on by Christopher Yeatman.

Caroline Yeatman, by her will, dated in May, 1873, after giving specific legacies, devised and bequeathed her residuary estate and effects equally between her sons, the defendants F. F. and H. J. Yeatman, and her daughter-in-law, the plaintiff Charlotte Murray Houghton Yeatman, subject to a proviso that if after her decease her son F. F. Yeatman should elect to enter into partnership with his brother Christopher, her residuary estate should go equally between H. J. Yeatman and the plaintiff, and she appointed F. F. and H. J. Yeatman her executors.

Caroline Yeatman died on the 31st of March, 1875, and on her death F. F. Yeatman did not elect to enter into partnership, but accepted the sum fixed by his father's will.

In March, 1876, the plaintiff issued her writ in this action against Christopher Yeatman and F. F. and H. J. Yeatman, and in her statement of claim she averred that although Christopher Yeatman from time to time paid to Caroline Yeatman certain sums on account of the interest on the capital, which he was by the will of the testator directed to pay to her, and of her share in the profits of the business, no proper yearly statement or balance-sheet had ever been made out by him, nor had any settled account ever been come to between him and Caroline Yeatman; and that, after Caroline Yeatman's death, the plaintiff being dissatisfied with the accounts rendered by Christopher Yeatman to

Caroline Yeatman's executors, required him to furnish a proper account of the capital of the testator employed in, and a profit and loss account of the business; and that the account rendered in consequence of this application was inaccurate. The plaintiff then made specific averments to show that such accounts were inaccurate, and that if they were properly taken there would be a considerable balance due from the defendant Christopher Yeatman to the estate of Caroline Yeatman, and she alleged that upon Christopher's refusal to correct his accounts she applied to the defendants F. F. and H. J. Yeatman, as the executors of Caroline Yeatman's *will, to take proper proceedings to recover the [212 personal estate of Caroline Yeatman from Christopher Yeatman, offering to indemnify them against the costs thereof, but that they had refused to do so, and she was unable to obtain her rights, except by independent proceedings of her own. She also alleged that the defendants, the executors, were personally interested in the residuary estate of the testator and in having the accounts already rendered accepted, and charged that they were acting in collusion with the defendant Christopher Yeatman in refusing to take proceedings for the rectification of such accounts. The plaintiff then claimed that a proper account should be taken of the capital of the partnership as it existed at the time of the testator's death, and of the dealings and transactions of the partnership from his death to the death of Caroline Yeatman; that the share of the plaintiff in what should be found due to the executors of Caroline Yeatman at the foot of such account might be secured for her benefit; and that, if and so far as necessary, the estate of Caroline Yeatman might be administered under the direction of the court.

The defendant Christopher Yeatman, in his statement of defence, maintained that there was no privity between himself and the plaintiff, and stated that he had paid Caroline Yeatman all that she was entitled to, and had settled all claims against him of the estate of Caroline Yeatman with her executors, his co-defendants, and had received their discharge for the same; and both he and his co-defendants, the executors, maintained that proper accounts had been delivered, which the executors alleged was the sole reason of their refusal to sue, and they respectively denied all personal interest or collusion in such refusal. The defendants, the executors, also submitted to take such proceedings, if any, as the court should direct.

Hastings, Q.C., and W. W. Cooper, for the plaintiff: It was the duty of the executors of Caroline Yeatman to sue

Christopher Yeatman; and mere refusal by executors to sue is sufficient to entitle a residuary legatee such as the plaintiff to maintain an action against the executors and the alleged debtor to the estate. It is only necessary to show that there is some outstanding asset which, but for the suit, [213] must be lost to the *estate: *Bowsher v. Watkins* (*); *Lancaster v. Evors* (*); *Travis v. Milne* (*); *Stainton v. Carron Company* (*); *Hilliard v. Eiffe* (*). But if not, there has been collusion between the defendants, the executors, and their co-defendant, the partner, and there are in this case such special circumstances as entitle the plaintiff to sue.

Dickinson, Q.C., and *H. A. Giffard*, for the defendants: *Bowsher v. Watkins* is no authority for the general proposition in support of which it has been cited, for there were special circumstances in that case which accounted for the decision of the court, *Davies v. Davies* (*); and the same remark applies to all the other cases relied upon by the other side. In this case collusion is not proved, and there are no special circumstances to justify the action.

HALL, V.C.: I cannot deal with this case without going into the merits.

The case was then gone into upon the merits, which do not call for further notice than will be found in the judgment.

HALL, V.C.: Before dealing with the facts and circumstances of this case, I will state what I consider to be the result of the cases to which I have been referred in reference to the competence of this plaintiff to take the present proceedings.

I was referred by Mr. Graham Hastings to several cases as supporting the proposition that mere refusal to sue on the part of a legal personal representative was sufficient ground to entitle a person interested in the estate, whether as residuary legatee or next of kin, or, it might be, as legatee (supposing there not to be sufficient assets without the alleged assets outstanding), to bring an action against the legal personal representative, and the alleged debtor to the estate, even though, as in this case, the alleged debtor might be the representative of a former testator.

The first of these cases was *Bowsher v. Watkins*.

[214] *That case has been frequently cited, and there is

(1) 1 Russ. & My., 277.

(2) 4 Beav., 158.

(3) 9 Hare, 141.

(4) 18 Beav., 146.

(5) Law Rep., 7 H. L., 39; 9 Eng. R., 27.

(6) 2 Keen, 534.

apparently, in the report of the judgment, which is very short, some ground for saying that an opinion was there expressed by the Master of the Rolls which might warrant the general proposition that in every case where there is a refusal to sue, a residuary legatee might himself sue the alleged debtor—the alleged debtor in that case, as in many others, being a surviving partner. But that case has, as was stated during the argument, been commented upon on several occasions, and suffice it to say, in *Davies v. Davies* (¹) and in *Wright v. Hamilton* (²), it is stated by the judges who decided those cases that there were special circumstances in *Bowsher v. Watkins* (³) which accounted for the view that was taken by the court; therefore it is not to be considered an authority establishing that a mere refusal to sue is sufficient to entitle a residuary legatee to institute an action against the debtor to the estate. I agree, therefore, with what was said by the defendants' counsel here, that that case had better never be referred to again as supporting any such general proposition.

The next case was *Lancaster v. Evors* (⁴). That case, as I observed during the argument, cannot be considered as any authority whatever for the proposition in question, because there were special circumstances in it. It came on upon a demurrer to a bill containing averments which, for the purposes of the demurrer, must be taken to be true, that the fund in respect of which the creditor sued formed the only assets; and so far is the case from establishing any such general rule, that, on the contrary, the Master of the Rolls in his judgment says: "I think that if this case did in other respects come within the general rule, the circumstances of the refusal of the executors to recover these, the only assets, would make the case an exception to the general rule."

Then there is the case of *Travis v. Milne* (⁵), where Lord Justice Turner thus states the rule (⁶): "Upon an examination of the authorities I believe it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which *such a bill can be sup- [215] ported. The cases, I think, may be considered to go to this extent, that such a bill may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the

(¹) 2 Keen, 534.

(²) 3 J. & Lat., 481.

(³) 1 Russ. & My., 277.

23 ENG. REP.

(⁴) 4 Beav., 158.

(⁵) 9 Hare, 141.

(⁶) 9 Hare, 149.

prosecution by the executors of the rights of the parties interested in the estate against the surviving parties. In the present case I entertain no doubt that the special circumstances are sufficient to maintain the bill." That is not an authority in favor of the proposition in question, but one which takes the rule to be otherwise, i.e., that in the absence of special circumstances there is no instance of such a suit being maintained.

In the case of *Stainton v. Carron Company* (¹), the Master of the Rolls states the rule thus (²): "I think it unnecessary to go in detail through all the cases to be found on this subject. I think that they may be summed up thus: that the persons interested in the estate of the testator, not being the legal representatives, will not be allowed to sue persons possessed of assets belonging to the testator unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate." That is a clear negative of the existence of any such rule as is contended for.

The only other case which was mentioned was that of *Hilliard v. Eiffe* (³). There is a judgment given in that case of the Vice-Chancellor of Ireland, in which he says (⁴): "The rule now appears to be subject to the exceptions of cases of collusion, of insolvency of the personal representatives, of refusal by them to sue, whether collusively or *bona fide*, or of the existence of what has been rather vaguely termed 'special circumstances.'"

I do not, however, consider that the Vice-Chancellor in that case laid down, or meant to lay down, any such rule as that mere refusal to sue would in any case be sufficient without the court taking into consideration the circumstances of the particular case, and I cannot treat it as an authority of the Vice-Chancellor for such a proposition. But if his statement of the rule is to be construed and read otherwise, I must say I respectfully dissent from it, and I think that it is at variance with the other authorities to which I have been referred.

216] * [His Lordship then went into the case upon the merits, and, after considering the proper construction to be put upon the will of the testator, and the facts in evidence on either side, came to the conclusion that there had been an erroneous mode of dealing by Christopher Yeatman with the capital of the testator, which had the effect of diminish-

(¹) 18 Beav., 146.

(²) 18 Beav., 159.

(³) Law Rep., 7 H. L. 39; 9 Eng. Rep., 27.

(⁴) Law Rep., 7 H. L., 44 n.

ing the income of Caroline Yeatman for his own benefit, and amounted to a breach of trust on his part, that there was nothing during the life of Caroline Yeatman to bind her to accept that mode of dealing, and that the accounts rendered after her death were based upon this erroneous dealing and breach of trust, and did not amount to any such settlement of account as would deprive the residuary legatees under Caroline Yeatman's will of the right to have proper accounts taken. His Lordship accordingly directed an inquiry as to what was the capital of the testator at the time of his death, and a general account to be taken during the life of Caroline Yeatman between her and Christopher Yeatman, prefaced by a statement of the opinion of the court that the whole amount of the testator's capital was, according to the true construction of the will, to be retained in the business during the life of Caroline Yeatman. In conclusion, his Lordship said:]

Notwithstanding the view that I have taken of this case with reference to the right to sue, my impression rather is that it would be a correct holding to say that if the circumstances of any given case are such that upon an inquiry directed as to whether any and what proceedings should be taken, the court upon the materials before it would come to the conclusion that it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful, there it would be a proper case to allow a party to sue in his own name. I do not mean to say that this would necessarily apply, supposing the executors, in a *bona fide* exercise of their discretion, had before come to a settlement of account and had settled with the parties sought to be made liable. I only mean that ordinarily that might form a fair test, as to whether a party should be allowed to institute such a suit after a refusal by the representatives to sue.

Solicitors: *J. Hales; Paterson, Snow & Burney*, agents for *Jebb & Son*, Boston.

A creditor of a deceased person may bring an action against the administrator and an assignee of the intestate to set aside an assignment by the intestate, in his lifetime, made to defraud creditors, where the administrator claims the assignment to be valid, or after reasonable request refuses to take proceedings to impeach the title of the assignee, or reach the property in his hands under such assignment. But in

such case the complaint, to be good, must allege the collusion of the administrator with the assignee, or his refusal or neglect to take steps to impeach the assignment: *Bate v. Graham*, 11 N. Y., 237; *Sto. Eq. Pl.*, §§ 178, 227, 514; *Long v. Magestre*, 1 Johns. Chy., 305; *Fisher v. Hubbell*, 7 Lans., 481, 1 *Thompson & Cooke*, 97, 65 Barb., 74; 3 *Williams on Ex'rs* (6th Am. ed.),

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2181-2, top paging; Holland v. Prior, 1 Mylne & Keene, 237, 243-8.

See also Robinson v. Carson, 19 Wall., 94; Collins v. Warner, 32 Ark., 87.

Where the executor or administrator is insolvent, the debtor to the estate may be made a defendant so as to prevent the money, when collected, from passing into the hands of the personal representative and being squandered. There are also other well recognized exceptions. Same authorities.

Ordinarily, a legatee or next of kin must sue the executor or administrator only for the legacy or distributive share; he cannot join with him the debtors to the estate or other persons. But where there is collusion between the executor and the debtor or person having the property in his hands, or where the executor is insolvent, the debtor may be made a party, and recovery be had against him: Dorsheimer v. Rorback, 23 N. J. Eq., 47, 53, affirmed 25 N. J. Eq., 516.

Ordinarily, it is not necessary to make debtors of the decedent parties to a bill against the executor by creditors or legatees. But where there is collusion alleged or suspected between the executor and the debtors, or he refuses to collect the debts, they are proper parties; and in case of a charge upon real estate, the heirs or devisees are proper parties with the personal representatives: Evans v. Evans, 23 N. J. Eq., 71.

An action may be maintained by a creditor of a deceased judgment debtor against the administrator and his assignee, to set aside an assignment made by such administrator of assets of the deceased debtor, without consideration, and to have the same declared to be assets belonging to the estate, and to be applied to the payment of the debts of the intestate.

Ordinarily, a creditor of the estate cannot maintain an action against a fraudulent vendee alone, or against him and the executor or administrator to set aside a fraudulent transfer. But if the executor or administrator collude with the fraudulent vendee, or, after reasonable request, refuse to take pro-

ceedings to impeach his title, a creditor may maintain an action against him and the executor or administrator for the purpose.

In order to have satisfaction of his claim (in this case a judgment) out of these assets, and in order to compel their application, under the statute, to the payment of his demand, it is not necessary that the creditor should have exhausted his remedy at law by judgment and execution.

The plaintiff, by commencing such action, gets no preference over other creditors and no priority in the payment of his claim: Everingham v. Vanderbilt, 51 How. Pr., 177.

In some of the states, in a suit by a legatee or a creditor charging a *devastavit*, the sureties of the personal representatives may be made co-defendants with such representatives.

Alabama: Gerald v. Miller, 31 Ala., 433; Moore v. Armstrong, 9 Porter, 697.

New York: Carow v. Mowatt, 2 Edw. Chy., 57, 62-7.

South Carolina: Taylor v. Taylor, 2 Rich. Eq., 123; Wilson v. Waterman, 6 Rich. Eq., 266-8; Maywood v. Butler, Harper's Chy., 265; Glenn v. Connor, Id., 267.

Virginia: Hutchinson v. Pigg, 8 Gratt., 220.

In others the contrary has been held.

Georgia: See Nutting v. Boardman, 48 Geo., 598.

New Jersey: Rorback v. Dorsheimer, 25 N. J. Eq., 520.

See Brandt on Suretyship, §§ 494-5.

When a proper party plaintiff refuses to become such, he may be made a defendant, the fact of his so refusing being alleged in the complaint: Bate v. Graham, 11 N. Y., 237.

Where one of two co-plaintiffs refuses to concur in the appointment of a solicitor, there being no solicitor on the record, the proper course is for the remaining plaintiff to apply to the court, by motion, on notice to the other, for the sole conduct of the cause. A motion to strike out the refusing party as plaintiff and make him a defendant, will be refused: Butlin v. Arnold, 1 Hem. & Miller, 715.

[7 Chancery Division, 217.]

Fry, J., Nov. 14, 15, 16, 1877.

***ATTORNEY-GENERAL V. GASLIGHT AND COKE [217 COMPANY.**

[1876 A. 79.]

Unavoidable Nuisance—Gas—Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 14—Gas Works Clauses Consolidation Act, 1847 (10 & 11 Vict. c. 15), s. 29—Legal Obligation.

By an act of Parliament reciting that under a former act incorporating the Gas Works Clauses Act, 1847, a gas company was under obligation to supply gas, the company was authorized to buy certain specified lands adapted for the purpose, the mode of supply was prescribed, and the gas was to be of a certain purity; but by this act and the Gas Works Clauses Act, 1847, it was provided that nothing in those acts contained should prevent the company from being liable to legal proceedings in consequence of making the gas:

Held, that the company was not justified in causing a nuisance even if the gas could not be made of the requisite purity without so doing:

But *held*, on the evidence, that it was not shown that by greater care and expense the nuisance might not be avoided.

Quære, on the construction of the acts, whether the company was under an obligation to supply gas.

THIS was an action by way of information by the Attorney-General at the relation of the Local Board of Health for West Ham, in Essex, against the Gaslight and Coke Company, claiming an injunction to restrain the company from carrying on business in such a manner as to cause a nuisance.

In 1869 the Imperial Gas Company (which was afterwards amalgamated with the Gaslight and Coke Company), under the powers of the Imperial Gas Act, 1869 ('), bought land at

(1) Imperial Gas Act, 1869 (32 & 33 Vict. c. cxxviii), recites Imperial Gas Act, 1854, and "Whereas under the provisions of the Metropolis Gas Act, 1860, the company are placed under the obligation to supply with gas the district thereby confided to them." "And whereas the lands hereinafter described are well adapted for the purposes of the company's undertaking, . . . and it is expedient that the company should be authorized to purchase the same."

Sect. 44 directs the Board of Trade to appoint gas referees.

Sect. 52: "Such referees shall from time to time ascertain with what degree of purity the company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighborhood in which the works are

situate, and shall thereupon prescribe and certify the maximum amount of impurity in each form with which gas supplied by the company should be allowed to be charged."

Sect. 54: "Gas supplied by the company shall be wholly free from sulphuretted hydrogen."

Sect. 88: "In addition to any lands which they are already empowered to purchase and hold, the company may from time to time purchase by agreement and hold all or any of the lands in the parish of West Ham hereinbefore described, and thereon or on any part thereof may construct works for the manufacture of gas Provided that nothing in this act contained shall prevent the company from being liable to an indictment or information for nuisance, or

218] Canning Town, *near West Ham, and built gasworks and made gas there. Ever since the gasmaking had begun, there frequently proceeded, as stated and proved by the relators and scarcely denied by the company, stinks of such intensity as to be a nuisance to the inhabitants of the district of West Ham, and the stink was in a great measure caused by the escape of sulphuretted hydrogen when the vessels used for the purification of the gas were emptied.

The company pleaded that the site of their works at Canning Town was approved of by the Legislature as well adapted for the purposes of their undertaking. They further pleaded and proved that they were situated in the midst of manufactories of a more or less offensive nature. They further pleaded that under the provisions of the Metropolis Gas Act, 1860 (*), with which was incorporated the Gas Works Clauses Consolidation Act (*), and of the 219] *Imperial Gas Act, 1869, they were compelled, under heavy penalties, to supply gas of a certain purity, and were obliged to adopt certain processes, which were the best and only processes known to science for this purpose.

At the trial witnesses were examined on both sides, and the effect of their evidence is stated above and in the judgment as given below. In the course of the trial it was proved that great quantities of stinking lime from the purifiers were brought in barges from the company's works at three other places and deposited at Canning Town Works, one witness attributing about half of the stink complained of to this proceeding. It appeared also that the gas referees had fixed a certain standard of purity for gas made in works within London, and a higher standard for gas made in the suburbs, where higher purification might, in their opinion, be effected without causing a nuisance. The standard ap-

to any other legal proceedings to which they may be liable in consequence of any such operations."

(1) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 14: "Every gas company from time to time supplying gas within any district shall, as to any premises or street within such district not already supplied with gas, and which shall lie within fifty yards of any existing mains, at their own expense, on being required by the owner or occupier of any premises within the district or in part within the district, who shall contract for not less than two years to pay gas rates in respect of such supply to an amount equal to twenty per cent. upon the outlay, provide and lay all proper and sufficient

communication, service, and other pipes up to the premises of such owner or occupier, to communicate with the gas company's mains, and shall, if so required by the owner, occupier, or local authority, furnish him or them, at the rate prescribed by this act, with a supply of gas for the purpose of being used in or on the premises, or for lighting the street."

(2) Gas Works Clauses Consolidation Act (10 & 11 Vict. c. 15), s. 29: "Nothing in this or the special act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas."

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plicable to this case was twenty grains of impurity for every 100 feet. It further appeared that the greater the purity the greater was the stink produced in the process of purification.

Kay, Q.C., *Aston*, Q.C., *Bardswell*, and *R. E. Webster*, in support of the information: Most of the nuisance is occasioned by the emission of sulphuretted hydrogen when the purifiers are opened, and this may well be prevented, no doubt with expense and trouble, but that is no reason why the neighborhood should suffer from a nuisance. The company are not compelled to make gas, but if they do they must, no doubt, supply it as prescribed by the acts of 1860 and 1869. These acts, however, and also the general act of 1847, carefully preserve the rights of the public. *Attorney-General v. Leeds Corporation* ⁽¹⁾ was a similar case, but stronger than this. Nuisance is well defined in *Soltau v. De Held* ⁽²⁾.

Benjamin, Q.C., *Davey*, Q.C., *A. L. Smith*, and *Hornell*, for the company: The act of 1860 in fact orders us to supply gas of a certain standard of purity, and we cannot do so without causing some nuisance. The place for our works was fixed on by Parliament as *well adapted for our [220] purpose. The Legislature must have contemplated a certain amount of nuisance, as in *Attorney-General v. Conservators of the Thames* ⁽³⁾. They must prove that we carry on our business negligently. Under sect. 14 of the act of 1860 we are bound to supply gas.

[FRY, J.: Where is the obligation? If you do supply gas, you must supply it in the prescribed manner, but are you obliged to make gas? Might you not cease to carry on business? Would a mandamus lie to compel you to make gas?]

It is not certain that a gas company could cease to make gas. The company is authorized to make gas at this place, and is obliged to make it of a certain purity, which it is impossible to do without causing some nuisance, and the company is therefore justified: *Re v. Pease* ⁽⁴⁾; *Mersey Docks Trustees v. Gibbs* ⁽⁵⁾. Moreover, we contend that the referees have fixed the standard higher than the Legislature contemplated, and so compel us to make the nuisance.

FRY, J.: This is an information by Her Majesty's Attorney-General at the relation of the Local Board of Health for the district of West Ham, against the Gaslight and Coke

⁽¹⁾ Law Rep., 5 Ch., 588.

⁽²⁾ 2 Sim. (N.S.), 133, 142.

⁽³⁾ 1 H. & M., 1.

⁽⁴⁾ 4 B. & Ad., 80.

⁽⁵⁾ Law Rep., 1 H. L., 93.

Company as defendants, and it prays for an injunction to restrain the defendants from carrying on business at their works at a place called Canning Town, not far from the shore of the Thames.

This information is filed upon the ground of public nuisance to Her Majesty's subjects; and it was admitted by the learned counsel for the defendants that a public nuisance had been created, and therefore it would appear, at first sight, a matter of course that an injunction should go in the terms of that prayer. But on behalf of the defendants the nuisance was justified, and their argument was this: "We are under an obligation to supply gas to a given metropolitan district, which is defined by the Metropolis Gas Act, 1860, and by the Imperial Gas Act, 1869; we are further under 221] an obligation to supply that gas with not more *than twenty grains of impurity for every 100 cubic feet of gas manufactured and supplied. Further, under the act of 1869 we had authority to take the land at Canning Town on which we are carrying on our manufacture, and we undertake to prove, as a matter of fact, that we cannot perform the obligation so cast upon us by the acts of 1860 and 1869 without creating a nuisance, and therefore we are justified." Now, I think that to all those arguments two sufficient replies have been given. In the first place, it is to be borne in mind that the Gas Works Clauses Act, 1847, contains in sect. 29 an express provision that nothing in that act, or in the special act, shall prevent the undertakers from being liable to legal proceedings to which they might be liable in consequence of the making or supplying of gas. That act, except so far as its provisions are inconsistent with the act I am about to refer to, was incorporated with the Metropolis Gas Act of 1860. Therefore I take it to be clear that the whole of the obligations imposed by the act of 1860 were made liable to that condition, and that a company performing the obligations of the act of 1860 could not justify themselves by setting up incapacity to make or supply gas without creating a nuisance. I therefore think that the foundation of that argument fails on the question of construction.

But even if it did not fail, I am of opinion that the defendants have not succeeded in their justification. It is to be borne in mind that the full burden of proof in this case rests entirely upon those who say that they cannot, without creating a nuisance, do a thing which they are bound to do. That would be the result of the ordinary rule of law upon the subject; and in this instance it is especially the case,

because by the act of 1869 a maximum of impurity is to be fixed by the referees, and the referees are from time to time to ascertain with what degree of purity the company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighborhood. Gentlemen of eminence and skill have been appointed referees. They have, in the discharge of their duty, fixed a maximum, and they have fixed it at an amount which in their judgment may be reasonably required without occasioning a nuisance to the neighborhood in which the works are carried on. There is, therefore, the judgment *of the public [222 officers appointed for the purpose, to the effect that this maximum can be obtained without occasioning a nuisance to the neighborhood. The defendants say, and say truly, that in this court the judgment of those referees is not binding, and that they are at liberty to show that the referees have fallen into error. They have accordingly had an opportunity of convincing me of this, if they could do so. They have given abundant evidence with that view; but they have failed, in my judgment, to discharge the burden of proof cast upon them by the general law, and by the particular act to which I have referred.

It is not necessary for me to say whether, if the affirmative had been on the plaintiffs, I should have come to the conclusion that the gas might be manufactured at the required degree of purity without committing a nuisance. It is enough for me to say that the defendants, on whom the burden rests, having to convince me, have failed.

Now I have had before me the evidence of many gentlemen. Mr. Vernon Harcourt, one of the referees, has confirmed on oath in his evidence here, subjected to cross examination, the opinion in which he had concurred as a referee. He visited these works in January of this year, and the result of the evidence on the part of the defendants is, that I must take the mode of proceeding at that time to be at least as favorable as it was during any portion of the time which is in controversy in this litigation; and Mr. Vernon Harcourt has pointed out what he considers to be defects in the precautions taken by the defendants at these works. He has contrasted the mode they used there with the mode they used at Fulham. In his opinion the Fulham process was conducted much more carefully and more skilfully, and it was more adapted to prevent nuisance than the process used at these works. Now, has that been displaced by the evidence given before me? In my opinion it has not. I am not satisfied on the evidence that there has been throughout

the whole of the period of controversy, from May, 1874, to 1876, due care in the covering up of the foul lime. I am not convinced that with a little more diligence, a little more zeal, and a little more expense, other methods might not have been used which would have been more effectual than the methods which were used. On the contrary, I think 223] *the evidence goes strongly to show that there were methods which had been used as early as 1874, and were more successful than the methods used during the period to which the litigation relates.

In coming to this conclusion, I therefore base myself not exclusively on the evidence of Mr. Harcourt, but also on the evidence of the other witnesses for the relators, leading me to the conclusion that something more could have been done. Nor is that conclusion, in my mind, disturbed by the evidence given by the scientific witnesses of the defendants. They do not pledge themselves to say that nothing more could have been done than was done. Some of them refer to an element of practicability. On that point I am not satisfied that more was not practicable than was done, even having regard to the question of expense; I can only, therefore, come to the conclusion that, the burden resting on the defendants to prove that they have done everything they possibly could to prevent the nuisance, they have not discharged that burden, even if discharging it would have justified them.

Being of this opinion, it follows that the injunction must go.

But there is one other fact to which it is impossible that I should not advert, and which, in my opinion, is conclusive of this litigation, irrespective of the conclusion I have arrived at with regard to the general process. It is this: from some time in the year 1874 down to the month of September, 1876, the whole of the refuse lime from three other works of the company was brought in barges to a dock upon this land; was transhipped from the barges to trucks without being covered over with breeze or anything else to protect it from the operation of the air, and was then carried upon those trucks and was tipped out on the land, where, no doubt, it was covered. That evidence before me is, to my mind, conclusive to show that the operation must have been attended with a great increase of the nuisance from the works, estimated by one of the witnesses at something like half of the whole smell and nuisance which resulted from the operations carried on there. Now, it is not pretended there was any obligation to do this: and with regard to this it appears

to me that the case is really undefended, and that the suggestion that the injunction should be limited to this act because this act was *not connected with the immediate [224 process of manufacture on the land is not well founded. This appears to me enough, as regards the period in controversy, to justify the injunction. The defendants were committing upon their land that which is admitted to be a public nuisance, and they were not doing so under any statutory obligation. The injunction must, therefore, go in the terms asked for, and, of course, the costs must be paid by the defendants.

Solicitors for relators: *Hillearys*.

Solicitors for defendants: *Willoughby & Cox*.

[7 Chancery Division, 224.]

Fry, J., Nov. 20, 1877.

RICHARDS V. REVITT.

[1876 R. 84.]

Restrictive Covenant—Lessee with Notice—Acquiescence—Substantial Damage.

Where the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant.

An assignee of land with notice of a covenant is subject to the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other.

By an indenture of conveyance dated the 5th of September, 1864, the Essex Freehold Land Company, the vendors of certain lots of building land at Leytonstone, covenanted with the plaintiff, Thomas Richards, and with each of the other purchasers of the lots, so far only as regarded the lot or lots then unsold, and so as to bind such lot or lots in the hands of any person or persons to whom the same might thereafter be sold, that no tavern, beer house, or place licensed for the sale of any liquors be opened or conducted, nor the business of a licensed victualler be carried on upon any of the said lots. One of the lots called Lot 55 remained unsold, and was in 1869 sold and conveyed by the Land Company to one Samuel Tipper. By an indenture of lease dated the 21st of July, 1875, *Samuel Tipper de- [225 mised the house built on Lot 55 (described in the indenture of lease as No. 1 Market Place) to the defendant Joseph Revitt for twenty-one years, Revitt covenanting not to use

or carry on any noxious, noisome, or offensive trade other than the trade or business of a grocer, provision dealer, or vender of wines, spirits, bottled ale, stout, or porter. The defendant Revitt was held on the evidence to have had, at the time when this lease was granted, notice of the covenants in the conveyance to the plaintiff. The defendant had been the occupier of No. 1 Market Street since 1869, and had since that time held licenses to sell wines and spirits, but the extent of his sales and the plaintiff's knowledge thereof were in dispute. He now held a license for the sale of wines and spirituous liquors, and sold them in considerable quantities. The plaintiff, who, besides the lot so purchased by him, was the owner of a tavern in the neighborhood, brought this action to restrain the use of any building erected on Lot 55 for the sale of any liquors, or for any of the purposes prohibited by the deed of conveyance of the 5th of September, 1864.

At the trial witnesses were examined on both sides, and the effect of the evidence is stated above and in the judgment of the court.

Kekewich, Q.C., and *Shebbeare*, for the plaintiff: The defendant had notice of the restrictive covenant, and is therefore bound by it: *Tulk v. Moxhay* (¹); *Wilson v. Hart* (²). As to the defence that the plaintiff had acquiesced, it does not follow that because he had not rushed into litigation to prevent insignificant breaches of a covenant he is now to lose his rights: *Kerr on Injunctions* (³); *Johnson v. Wyatt* (⁴).

Cookson, Q.C., and *Bilton*, for the defendant: The plaintiff has not proved that he has received substantial, or indeed any damage: *St. Helen's Smelting Company v. Tipping* (⁵). He was not a party to the covenant and could not have recovered damages at law, and is now proceeding on equitable grounds, and *no injunction will be granted unless the damage is substantial. He is also estopped by acquiescence and by allowing the defendant to go on and establish his business, and then, when the business became prosperous, try to stop him: *Dann v. Spurrier* (⁶).

Fry, J., after stating the facts, continued: The result is that, according to *Tulk v. Moxhay* (¹), and that class of cases, the defendant, having notice of the covenant, is bound by it.

But a further defence of acquiescence and encouragement is set up. Now this is the trial of the action, and I cannot

(¹) 2 Ph., 774.

(⁴) 2 D. J. & S., 18.

(²) 2 H. & M., 551; Law Rep., 1 Ch., 463.

(⁵) 11 H. L. C., 642.

(⁶) 7 Ves., 281.

(³) Page 226.

at this stage of the proceedings refuse, on the ground of acquiescence, to give the plaintiff relief, unless I decide that his remedy is forever lost. But what are the facts as to acquiescence. [His Lordship then stated the principal evidence on the subject.] Upon this evidence I hold the plaintiff was not fixed with knowledge that from 1870 the defendant was selling foreign wines; and the only case is as to his knowledge that the defendant was selling British wines. That breach of the covenant was only in respect of a small class of goods, but the present breach is wider, and extends to much more important classes of goods—wine, spirits, ale, and porter. The fact that the plaintiff did not interfere to prevent a small and limited breach does not conclude him for all time in respect of a wider and more important breach. Besides, the plaintiff did actually remonstrate on hearing of the proposed lease to the defendant. I therefore hold that there has been no such acquiescence by the plaintiff as to prevent him from obtaining relief.

Another argument brought forward for the defendant was that we have not here an express and direct contract, and that in a case where the court proceeds on the ground of notice, substantial damage must be shown in order that an injunction may be granted. The cases, however, do not support this contention. *Wilson v. Hart*⁽¹⁾ was fully argued, and such an argument would undoubtedly have been used if it could have been maintained. There the plaintiffs could not have sustained substantial damage, *but [227 an injunction was granted. That case, therefore, seems a direct authority that notice of a covenant puts the defendant in the same position, and that the court will proceed exactly as if he were a party to the covenant. I therefore overrule that objection, and the injunction must be granted.

Solicitors for plaintiff: *Houghtons & Byfield*.

Solicitor for defendant: *A. W. Salgrove*.

⁽¹⁾ Law Rep., 1 Ch., 468.

See 16 Eng. Rep., 698 note; 19 Eng. R., 289 note; National, etc., v. Prudential, etc., *ante*, p. 331 note.

[7 Chancery Division, 227.]

Fry, J., Nov. 21, 1877.

LUKER V. DENNIS.

[1876 L. 242.]

Restrictive Covenant as to Land—Assignee with Notice—Public house—Covenant to buy Beer of one Brewer only—Implied Condition to supply good Beer.

The lease of a public house granted by a brewer to a publican contained a covenant by the latter for himself, his executors, administrators, and assigns, to purchase from the brewer all the beer consumed at that public house, and also at another public house of which the publican held a lease under a different landlord:

Held, that the covenant was binding in equity upon an assignee of the second public house who had notice of the covenant.

Keppell v. Bailey ⁽¹⁾, so far as it is a decision that a restrictive covenant as to the use of land, which does not run with the land at law, is not binding in equity upon an assignee with notice, has been overruled by more recent cases.

The lease of the first public house contained also a covenant by the brewer that he would supply the publican with all the beer required for consumption at both the public houses, such beer to be of a specified quality and price:

Held, that the obligation of the lessee's covenant was conditional upon the performance by the lessor of his covenant.

The assignee of the lease of the second public house borrowed money of the brewer upon the security of a mortgage of that lease, and in the mortgage deed he covenanted with the brewer to buy of him all the beer consumed at that public house:

Held, that this covenant was subject to an implied obligation on the part of the brewer to supply good marketable beer.

THIS was an action by a firm of brewers against a publican to restrain him from purchasing the beer sold by him [228] at the public *house from any other brewer in violation of covenants by which, as the plaintiffs alleged, he was bound.

By an indenture dated the 27th of December, 1873, Thomas Worraker demised to James Crabb a public house called the Milton Arms, at Southend, in Essex, for the term of twenty-eight years from the 25th of December, 1873.

Thomas Osborne was, in March, 1874, a brewer at Stanbridge, in Essex, and was the owner in fee of a public house called the Sutton Arms, situate on the road from Leigh to Southchurch, in Essex, and he agreed to demise the same to James Crabb and Henry Dennis. Osborne afterwards contracted with John George Baxter, George John Baxter, and Henry Luker, who carried on the business of brewers at Southend under the firm of Luker & Co., for the sale to them of the Sutton Arms, and also of his business of a brewer carried on at Stanbridge.

By an indenture dated the 31st of March, 1874, Osborne, in pursuance of his agreement, and with the concurrence of

(1) 2 My. & K., 517.

Luker & Co., demised the Sutton Arms to James Crabb and Henry Dennis, their executors, administrators, and assigns, for the term of ninety-nine years from the 29th of September, 1873. By this deed (among other things) James Crabb and Henry Dennis, for themselves, their heirs, executors, administrators, and assigns, and as a separate covenant each of them thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with Usborne, his heirs, and assigns, and as a separate covenant with the Baxters and Luker, their heirs, executors, administrators, and assigns, that they the lessees, their executors, administrators, and assigns, would have and purchase from Usborne, his heirs, or assigns, until the completion of the sale to the Baxters and Luker, and, after such completion, of and from the Baxters and Luker, their executors, administrators, or assigns, all the beer, porter, and malt liquors which should be sold or consumed upon the beer house called the Sutton Arms during the term thereby granted, and also upon the public house called the Milton Arms, at Southend, "whereof, also, the said lessees are tenants for all the residue of their existing tenancy of twenty-one years from the 29th of September, 1873." And Usborne, for himself, his heirs, executors, administrators, and assigns, and the Baxters and Luker, for themselves, *their executors, administra- [229 tors, and assigns, thereby covenanted with the lessees, their executors, administrators, and assigns, that the covenantors, their heirs, or assigns, should and would respectively supply the lessees, their executors, administrators, or assigns, with all the beer, porter, and malt liquor which they might require for sale or consumption upon the houses called the Milton Arms and the Sutton Arms, such beer, porter, and malt liquor to be of the same quality and price as that then supplied by Usborne & Co. to the houses in the neighborhood from their Stanbridge brewery, and subject also to the same deductions as were made on such sales, together with a further deduction of 5 per cent. on the price of the articles so supplied to the Milton Arms. The sale by Usborne of the Sutton Arms and the brewery business to the plaintiffs was afterwards completed.

By an indenture dated the 23d of May, 1874, Crabb assigned the Milton Arms to Benjamin Dennis, the defendant, his executors, administrators, and assigns, for the residue of the term of twenty-eight years granted by the lease of the 27th of December, 1873. The defendant entered into possession of the Milton Arms and carried on there the business of a publican. In June, 1874, the plaintiffs lent the

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defendant £250, and to secure the repayment thereof he, by an indenture dated the 8th of June, 1874, demised the Milton Arms to Luker & Co. and their assigns, for the residue of the term of twenty-eight years granted by the lease of the 27th of December, 1873 (except the last two days thereof), subject to a proviso for redemption on payment of the £250 with interest, as therein mentioned. And, in consideration of Luker & Co. having agreed to make the advance of £250 to the defendant, he, for himself, his executors, administrators, and assigns, and for the tenants and occupiers for the time being of the Milton Arms, covenanted with Luker & Co. and their assigns, and with the owners or other person or persons for the time being in actual possession of the brewery then carried on or occupied by Luker & Co. at Southend, and with each and every of them, that the defendant, his executors, administrators, and assigns, and the occupiers for the time being of the Milton Arms, would at all times during the residue of the term of twenty-eight years take and purchase of the covenantees, or of some or one of 230] them, their or some or one *of their executors, administrators, or assigns of the benefit of this covenant, or of such person or persons as they or he might direct, all beer, ale, porter, malt liquors, wines, spirits, and spirituous liquors and compounds which should be brought by the defendant, his executors, administrators, or assigns, into the Milton Arms or other premises held in connection therewith; and all such liquors and excisable commodities as might be sold by him or them under any special or occasional license granted to the occupier of the Milton Arms for the time being. And it was thereby covenanted, agreed, and declared, that this covenant was to be observed, performed, and carried out whether the £250 and the other moneys thereby secured were repaid by the defendant or his assigns, or recovered by the plaintiffs or not. Provided that, if the defendant or his assigns should pay to Luker & Co. all moneys due from him under the security thereinbefore contained, he should be at liberty to deal with whomsoever he pleased for wines, spirits, and spirituous liquors (but not for malt liquors), anything therein contained to the contrary notwithstanding. In November, 1875, the defendant repaid to the plaintiffs the moneys secured by this indenture.

The action was commenced on the 16th of November, 1876, and by the statement of claim the plaintiffs alleged that the defendant had for some time past refused, and still refused, to purchase the beer, ale, porter, and malt liquors sold and consumed at the Milton Arms from the plaintiffs, or to ob-

serve the covenants contained in the deed of the 31st of March, 1874, or the 8th of June, 1874, but purchased the same from other brewers, although the plaintiffs were ready and willing and had offered to supply the defendant with such beer, ale, porter, and malt liquors of good quality in requisite quantities and at fair and reasonable prices, in accordance with their covenants.

The plaintiffs claimed an injunction to restrain the defendant from breaking the covenants; damages for breaches of the covenants; and the costs of the action.

By his statement of defence the defendant denied that he had become bound by any of the covenants contained in the deed of the 31st of March, 1874, but he said that if he ever did become bound to observe those covenants, such observance was conditional *on the performance by the [231 plaintiffs of the covenant on their part contained in the same deed. And he said that in breach of that covenant the plaintiffs had supplied to him for the use of the Milton Arms, beer, porter, and malt liquors, at a higher price than, and of a quality far inferior to, that supplied by Usborne & Co. to the houses in the neighborhood, and in fact of a kind so bad and unwholesome as to be unfit for the use of the defendant's customers. And as to the covenant contained in the mortgage deed of the 8th of June, 1874, the defendant submitted that the plaintiffs, after the execution of that deed and by reason of it, became subject to an implied obligation to supply to the defendant, for the use of the Milton Arms, beer, porter, and malt liquors of a good and wholesome quality, whereas they had, in fact, supplied him with bad and unwholesome beer and other malt liquors, by reason whereof, as he submitted, he was justified in discontinuing to purchase beer and other malt liquors from the plaintiffs.

This was the trial of the action.

It was admitted on behalf of the defendant that he had, when he took the assignment of the lease from Crabb, a general knowledge that the Milton Arms was tied to the Sutton Arms, and that they were both subject to some arrangement for taking beer from the plaintiffs.

North, Q.C., and *Jason Smith*, for the plaintiffs: The defendant admits that he knew enough to put him upon inquiry as to the nature of the obligation, and he was therefore bound to inquire. If the plaintiffs have supplied bad beer, that might be an answer to an action for breach of the defendant's covenant, if he on that occasion bought beer elsewhere, but it would not entitle the defendant to say that the covenant had been put an end to altogether.

[FRY, J.: Suppose the plaintiffs continued to supply bad beer to such an extent as to lead to the inference that they would always do so, would the defendant be bound to go on dealing with them forever?]

Possibly a time might come when he would be released. No doubt, if they supplied something which was not beer, 232] for instance, *water, the defendant might be released. If bad beer was supplied for a month, and after that good beer was supplied, the defendant would not be justified in buying his beer elsewhere, and if he did so, the plaintiffs would recover substantial damages in an action on the covenant: *Weaver v. Sessions* ⁽¹⁾; *Jonassohn v. Young* ⁽²⁾.

[FRY, J., referred to *Withers v. Reynolds* ⁽³⁾.]

Meadows White, Q.C., and *G. W. Lawrance*, for the defendant: If the defendant is bound at all by the covenant in the deed of the 31st of March, 1874, it is because he had notice of it. But in all the cases in which it has been held in equity that an assignee with notice is bound by a restrictive covenant as to the use of land, there has been an antecedent relation, such as that of vendor and purchaser, or that of lessor and lessee, existing, independently of the covenant between the original covenantee and covenantor: *Tulk v. Moxhay* ⁽⁴⁾; *Schreiber v. Creed* ⁽⁵⁾; *Coles v. Sims* ⁽⁶⁾; *Catt v. Tourle* ⁽⁷⁾. *Keppell v. Bailey* ⁽⁸⁾ is a distinct authority that if no such antecedent relation existed the covenant would not be binding in equity on an assignee with notice. In the present case no relation *dehors* the covenant existed between the plaintiffs or their predecessors and Crabb and H. Dennis with regard to the Milton Arms. Therefore *Keppell v. Bailey* applies.

[FRY, J., referred to *Wilson v. Hart* ⁽⁹⁾.]

Secondly, the covenant by the lessees in the deed of the 31st of March, 1874, is dependent upon that of the lessors in the same deed; if they are not ready and willing to fulfil their covenant, the defendant is released from his covenant. If he can prove a succession of breaches by the plaintiffs, the court will infer that they are not ready and willing to fulfil their covenant, and then the defendant will be released: *Coward v. Gregory* ⁽¹⁰⁾. Again, the defendant's own covenant in the mortgage deed is subject to an implied obligation 233] on the part of the plaintiffs to supply him *with

⁽¹⁾ 6 Taunt., 154.

⁽²⁾ 4 B. & S., 296.

⁽³⁾ 2 B. & Ad., 882.

⁽⁴⁾ 2 Ph., 774.

⁽⁵⁾ 10 Sim., 9.

⁽⁶⁾ Kay, 56.

⁽⁷⁾ Law Rep., 4 Ch., 654.

⁽⁸⁾ 2 My. & K., 517.

⁽⁹⁾ Law Rep., 1 Ch., 463.

⁽¹⁰⁾ Law Rep., 2 C. P., 153.

good beer—beer fit to drink: *Holcombe v. Hewson* (¹); *Cooper v. Twibill* (²); *Thornton v. Sherratt* (³); *Stancliffe v. Clarke* (⁴).

There is a *dictum* of Lord Justice Selwyn to the same effect in *Catt v. Tourle* (⁵). Suppose the plaintiffs became bankrupt, or that for any other reason, for a year or for a month, they could not supply the defendant with beer, the the covenant would be at an end. The defendant's trade depends upon his supplying his customers with a good marketable beer, and the plaintiffs are bound (with reasonable exceptions) always to supply him with such an article. Again, it is an unreasonable stipulation that the covenant in the mortgage deed should continue after the repayment of the debt: *Mitchel v. Reynolds* (⁶).

Lastly, the covenant in the deed of the 31st of March, 1874, could not lawfully be entered into by the tenants of one house, the Milton Arms, with the landlord of another, the Sutton Arms.

[FRY, J., referred to *Ackroyd v. Smith* (⁷).]

The court has a discretion as to granting an injunction, and will not do so if no damages could be given.

North, in reply:

[FRY, J., asked whether the defendant could be bound by the covenant in the deed of the 31st of March, 1874, inasmuch as he was the assignee from Crabb of a term of twenty-eight years from the 25th of December, 1873, whereas Crabb and Dennis were described in the deed of the 31st of March, 1874, as having a tenancy of twenty-one years from the 29th of September, 1873.]

That term must be subsisting or it must have been surrendered, and the defendant, having had notice of the deed of the 31st of March, 1874, is estopped from setting up a surrender as against the plaintiffs: *Piggott v. Stratton* (⁸).

Then, as to the effect of notice. *Keppell v. Bailey* (⁹) was not really decided upon the effect of notice; the real question there was whether the covenant ran with the land. If *Keppell v. Bailey* *is an authority on the question [234 of notice, it has been practically overruled by the more recent cases. In none of them did the decision depend upon the existence of any antecedent relation between the covenantor and the covenantee. The equitable doctrine of notice has been largely developed since *Keppell v. Bailey* (⁹). This

(¹) 2 Camp., 391.

(²) 3 Camp., 286 n.

(³) 8 Taunt., 529.

(⁴) 7 Ex., 439, 446.

(⁵) Law Rep., 4 Ch., 659.

(⁶) 1 P. Wms., 181.

(⁷) 10 C. B., 164.

(⁸) Joh., 341; 1 D. F. & J., 33.

(⁹) 2 My. & K., 517.

clearly appears from *Catt v. Tourle* ⁽¹⁾, and from the observations of Lord Justice Knight Bruce in *De Mattos v. Gibson* ⁽²⁾. At any rate, it is sufficient that the relation of lessor and lessee existed between the covenantees and the covenantor with respect to the Sutton Arms. It was all one bargain.

And, with regard to the inter-dependence of the two covenants in the deed of the 31st of March, 1874, and the supposed implied obligation of the plaintiffs arising on the defendant's covenant in the mortgage deed, the defendant must go so far as to show that we are not ready and willing to supply him with good merchantable beer: *Freeth v. Burr* ⁽³⁾. All that he alleges by his statement of defence is that we have supplied unwholesome beer. That is not sufficient.

FRY, J.: I have to determine three points of law before going into the evidence. The first question raised is whether the covenant contained in the deed of the 31st of March, 1874, was binding on the defendant who claims title to the Milton Arms under the assignment of the 23d of May, 1874. On this question the first difficulty which arises is this, that in the deed of the 31st of March, 1874, the interest in the Milton Arms which is represented as existing in Crabb and Henry Dennis is a tenancy of twenty-one years from the 29th of September, 1873, whereas the interest of which the defendant is the assignee is, not that term, but another term of twenty-eight years granted to Crabb and commencing on the 25th of December, 1873. To that difficulty I think Mr. North has given a conclusive answer. He says the defendant admits notice of the covenant, and he is in possession of the property. He must further admit either that the term of twenty-one years is still subsisting, or that it has been [235] surrendered by Crabb and Henry *Dennis, and he, claiming through Crabb, cannot, any more than Crabb himself could, set up that surrender against the third person with whom he entered into the restrictive covenant, and he can only hold the property subject to that covenant which was entered into for the benefit of that third person. This assumes that the covenant is binding upon the defendant as being an assign with notice of the covenant, and then arises the question whether the covenant is binding on him. The case of *Keppell v. Bailey* ⁽⁴⁾ is relied upon by the defendant. In that case the owners of some ironworks had joined with some other persons in forming a joint stock company to construct a railway for the purpose of connecting a lime quarry

⁽¹⁾ Law Rep., 4 Ch., 654.

⁽²⁾ 4 De G. & J., 276, 282.

⁽³⁾ Law Rep., 9 C. P., 208 & Eng. R., 393.

⁽⁴⁾ 2 My. & K., 517.

with the ironworks and with other works, and with a canal, and in the partnership deed of the railway company there was a covenant by the owners of the ironworks, for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, to procure all the limestone used in the ironworks from the lime quarry, and to convey all the limestone, and also the ironstone from their mines, to their works along the railway, and to pay a fixed toll; and it was held by Lord Brougham that this covenant did not run with the land, and was not binding at law upon a person who had purchased the ironworks, and that he was not bound in equity by reason of his having purchased with notice of the covenant. Lord Brougham said ('): "The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorizes him to affect by his contracts—had attempted to create a real burthen upon property which is inconsistent with the nature of that property, and unknown to the principles of the law—cannot bind such assignee by affecting his conscience."

It is contended that that case must have been differently decided if the equitable doctrine of notice was applicable to such a covenant. But it was truly observed by Mr. North that at the time when *Keppell v. Bailey* was decided the equitable doctrine of notice had not received the development which it has since received. It is admitted that there is a large class of cases in which persons have been held to be affected by implied notice of covenants of this kind. But it is said that in all these cases some antecedent relation, such *as that of vendor and purchaser, or lessor and [236 lessee, existed between the covenantee and the covenantor with respect to the land sought to be affected by the covenant independently of the covenant, and that the doctrine of notice ought not to be pushed beyond cases of that kind. On the other hand, I am pressed by the language of Lord Justice Knight Bruce in *De Mattos v. Gibson* (2), in which he laid down this very general proposition: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

(1) 2 My. & K., 547.

(2) 4 De G. & J., 282.

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And I am further pressed with this, that the doctrine thus laid down formed the basis of the judgment of the Court of Appeal in *Catt v. Tourle* ⁽¹⁾.

The question I have to consider is whether I am bound by *Keppell v. Bailey* ⁽²⁾ after those observations of Lord Justice Knight Bruce, after the mode in which they were applied by the Court of Appeal in *Catt v. Tourle*, and after the long series of cases, of which *Wilson v. Hart* ⁽³⁾ is a well-known example, in which the distinction which is now suggested does not seem to have been raised or to have occurred to the judges. I think I must come to the conclusion that I am not bound by *Keppell v. Bailey* so far as it relates to the effect of notice of a covenant of this nature. I think it cannot be reconciled with the more recent cases, and it is more straightforward to say this than to attempt to draw refined distinctions. I think, therefore, that I am bound to give effect to the equitable doctrine of notice, notwithstanding *Keppell v. Bailey*. Mr. North also argued that, even if *Keppell v. Bailey* is still binding on me, this is a case in which the relation of landlord and tenant existed, inasmuch as the same deed dealt with the Sutton Arms and created a tenancy in respect of them. In my view of the authorities, however, it is unnecessary to determine that question. I 237] hold, therefore, that the covenant in the *deed of the 31st of March, 1874, is binding upon the defendant, who had notice of it when he took the assignment of the lease of the Milton Arms.

The next question is, what is the true construction of that covenant? It cannot, in my view, be an absolutely unconditional covenant; it must, from its very nature, subsist only so long as the plaintiffs are willing to supply beer to the Milton Arms. And if it stood alone, I should hold that it was subject, at any rate, to some implied condition. But there is also in the deed the subsequent covenant on the part of the plaintiffs that they will supply beer of a certain quality and at certain prices. Finding these two covenants in the same deed, I think it is more reasonable to hold that, so far as the two are correlative, the first is conditional on the observance of the second, than to say that the first is subject to some implied condition, and that the second is an entirely independent covenant.

With regard to the covenant contained in the mortgage deed of the 8th of June, 1874, there is really very little in controversy. It is, in my opinion, a covenant conditional

⁽¹⁾ Law Rep., 4 Ch., 654.

⁽²⁾ Law Rep., 1 Ch., 463.

⁽³⁾ 2 My. & K., 517.

on a supply being made by the plaintiffs of good marketable beer. Various expressions are used in the cases which have been referred to, but I think they all really amount to the same thing. In one case the term "good and wholesome beer" is used, in another "good marketable beer." I see no objection to any of these expressions.

The question which I shall have to try with regard to the covenant in the first deed will be whether the plaintiffs have supplied the defendant with beer according to their covenant; and the question on the covenant in the second deed will be whether the plaintiffs have supplied the defendant with beer of a good marketable quality. On these points evidence may be adduced. The question what amount of neglect on the part of the plaintiffs will relieve the defendant from his covenant still remains open.

One of the plaintiffs was then called and examined, but before his examination was concluded the parties arranged terms of compromise.

Solicitor for plaintiffs: *W. R. Preston.*

Solicitor for defendant: *John Hudson.*

[7 Chancery Division, 255.]

M.R., Dec. 2, 1876 : C.A., July 23, 24 ; Nov. 26, 1877.

*LUCENA V. LUCENA.

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Will—Construction—Surviving Children—"Surviving" read "Other"—Settled and unsettled Shares—Children surviving by Stocks.

A testator gave his residuary estate to trustees in trust for all his children equally, and directed that the shares of his sons should be paid to them at the age of twenty-five, and that the shares of daughters should be settled in trust for them for life for their separate use, and after their death in trust for the issue of such as should leave issue; and in case of the death of any of his sons before attaining twenty-five, or of any of his daughters without issue, or having issue, all such issue should die, being sons before twenty-five or daughters before twenty-one or marriage, the share or shares of him or them so dying should go in equal shares to the testator's "surviving children" in the same manner as the original shares.

The testator left three sons, all of whom attained twenty-five, and three daughters, all of whom married.

On the death without issue of one of the daughters whose share was to be distributed, one brother was still alive, and two brothers and two sisters were dead, and both of these sisters had left issue still living :

Held, by Jessel, M.R., that surviving children meant those who were surviving either personally, or, in the case of the daughters whose shares were settled, by their stocks; and that the surviving brother and the issue of the two deceased sisters were entitled to the fund.

But *held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that "surviving" meant "other," and that the fund was divisible in fifths among all the brothers and sisters of the deceased daughter.

THIS was a petition in a suit instituted in the year 1818 for the administration of the estate of John Charles Lucena.

By his will, dated the 12th of August, 1812, John Charles Lucena, after giving certain specific bequests and annuities, devised and bequeathed all the residue of his estate and effects unto his executors upon trust for his several children, namely, the plaintiff James Lancaster Lucena, the defendant John Charles Lucena, the defendant Mary Clara Barnewall (then Mary Clara Lucena), the defendant Joanna Harriet Inglis (then Joanna Harriet Lucena), the defendant Stephen Lancaster Lucena, and the defendant Clara Eliza Cutlar (then Clara Eliza Lucena), all since deceased, and to any other child or children he might thereafter have, equally, share and share alike; and the said testator directed that his executors should apply the income of his residuary estate towards the maintenance and education of his children *during their respective minorities, and should accumulate the surplus income for the use and benefit of his said children, so that each should enjoy an equal share of his property and of the annual produce thereof; and he directed that the shares of such of his sons as should conduct themselves with propriety to the satisfaction of his executors should be paid or transferred to them at the age of twenty-five years; but in case the conduct of any of his said sons should not be satisfactory to his said executors, the share of such son should remain vested in the executors, and should be held in trust for such son for life, and after his death for his children, to be payable to sons at the age of twenty-five, and to daughters at the age of twenty-one or marriage. With respect to the shares of his daughters, the testator directed that the same should remain vested in the executors upon the trusts following; that is to say, in trust to pay the annual income of their respective shares to his daughters during their life for their separate use, and after their death in trust as to the shares of such of his daughters as should die leaving issue, for such issue, share and share alike, to be paid and transferred to such issue, being sons, at the age of twenty-five, and being daughters, at the age of twenty-one or marriage. And the testator then proceeded as follows: "And in case of the death of my said daughters or of any of my sons before they shall have attained their respective ages of twenty-five years, or of such of them as shall not have received his or their share or respective shares of and in the residue of my said estate for the reasons aforesaid, without lawful issue, or having such, and they shall all happen to die, being a son or sons before he or they

shall have attained the age of twenty-five years, or being a daughter or daughters before the age of twenty-one years or marriage, then and in such case I do hereby will and direct that the share or respective shares of him, her, or them so dying shall go to and be divided equally between my surviving children, and be paid to them or applied to their respective uses in such manner as his or their original shares are hereby directed to be paid and applied, or remain vested for his, her, or their separate uses in my said executors, according to the true intent and meaning of this my will. And in case of the death of all my said children without issue, or leaving such, and they shall happen to die under the *aforesaid age, and before they shall have [257 received their respective shares of and in the residue of my said estate, then in trust that my said executors do and shall stand possessed of the said residue of my estate, one-third for the use and benefit of my wife Mary Ann Lucena, as to one other third part thereof in trust for my sister Joanna Lucena, and as to the remaining third part thereof in trust for all and every the children of my cousin Clara Kettle, equally, share and share alike." And the said testator declared that in case of his daughters or any of them marrying with the approbation of his executors, and the person or persons with whom they might happen to marry should be willing to make a suitable settlement upon his said daughters or any of them, in such case the testator authorized his said executors to advance and pay down, upon such settlement being duly executed, so much of the respective shares of his said daughters as they should think proper, or to settle the same upon such other trusts as they should consider to be most for the advantage and benefit of his said daughters respectively, so that provision might be made for them to the full extent of their fortune in case of their surviving their respective husbands, and to their lawful issue after the death of their parents.

The testator made a codicil to his will, dated the 23d of April, 1813, and thereby directed that the sum of £10,000 should be set apart in the names of his executors for the benefit of his eldest son, James Lancaster Lucena, during his life, and afterwards for his lawful issue; but in case of his death without such lawful issue (which event happened), then and in such case he directed that the said principal sum of £10,000, the accumulations of income, should revert and become part of and go along with the residue of his said estate, and be divided amongst "the rest of his children" in such manner as directed by his said will as to such resi-

due, anything thereinbefore or in his said will contained to the contrary notwithstanding.

The testator left six children, namely, those named in his will, all of whom attained the age of twenty-five years.

In the year 1828 Joanna Harriet married Charles Inglis, and on her marriage her sixth share was carried to a separate account in the suit.

258] *She died on the 9th of May, 1876, without issue, and the present petition was presented for the payment of her share to the persons entitled thereto.

Clara Eliza Cutlar died in July, 1871, leaving issue who were still living.

Mary Clara Barnewall died in May, 1872, also leaving issue who were still living.

James Lancaster Lucena died in December, 1866, a bachelor.

John Charles Lucena died in February, 1868, leaving issue who were living at his death.

Stephen Lancaster Lucena survived Mrs. Inglis, and died in June, 1876.

No objection was made to the conduct of either of the sons.

The petitioner, Gerald Surman, was the legal personal representative of the two brothers of Mrs. Inglis who died in her lifetime, namely, James Lancaster Lucena and John Charles Lucena, and he prayed that the fund might be divided into fifths, and that he might be declared entitled to two of those fifths.

The petition came on to be heard before the Master of the Rolls on the 2d of December, 1876.

Fischer, Q.C., and *Rawlinson*, for the petitioners contended that, according to the true construction of the will, "surviving children" meant "other children," and that consequently the funds were divisible in fifths, of which two fifths belonged to the petitioners.

Cookson, Q.C., and *Caldecott*, *Davey*, Q.C., and *North*, for the issue of the two deceased sisters, contended that "surviving children" meant children surviving either by themselves or by their issue, and that the funds were therefore divisible in thirds: *Doe v. Wainwright* (¹); *In re Tharp's Estate* (²); *Badger v. Gregory* (³); *Waite v. Littlewood* (⁴); *Wake v. Varah* (⁵).

Chitty, Q.C., and *Smart*, for Stephen L. Lucena, the brother of Mrs. Inglis who survived her, submitted that

(¹) 5 T. R., 427.

(²) 1 D. J. & S., 458.

(³) Law Rep., 8 Eq., 78.

(⁴) Law Rep., 8 Ch., 70; 4 Eng. Rep., 760.

(⁵) 2 Ch. D., 348; 16 Eng. Rep., 781.

"surviving" should *be read literally, and therefore [259 that the surviving brother took the whole: *Turner v. Frampton* (*); *Maden v. Taylor* (*).

Roxburgh, Q.C., and *Romer*, for Mrs. Inglis's legal personal representative.

[JESSEL, M.R., referred to *Ingram v. Soutten* (*) and *Hawkins on Wills* (*).]

Fischer, in reply.

JESSEL, M.R.: I am rather surprised to find a new case on the words "survivor or survivors." As far as I am aware, and as far as counsel at the bar have been able to discover, it is a new case. The novelty consists in this, that among the reported cases there are only two classes—a first class of cases where the original gift was to the children absolutely unsettled, and a gift over on the death of any one under a given age; and the second class of cases where the shares of the children were settled upon them for life, with remainder to their children or more remote issue, with a gift over upon their death, and on the failure of such children or more remote issue, over to the survivors. But this belongs to a third class of cases, because some of the shares are settled upon the children, that is, the shares of the daughters, and in one event the shares of the sons, are given to them for life, with remainder to their children, while other shares, that is, the shares of those sons whose shares are not settled, are given to them absolutely; and then, in the event of any of the absolute owners not having attained twenty-five, or in the event of any of the tenants for life dying without children or remoter issue, or on failure of such issue, the share of the child so dying is to go over to the surviving children. Consequently it is a mixed case, so to speak, there being both sorts of gifts as regards the children or remoter issue.

Now, the first question I have to consider is, whether the rules which have been established as regards settled shares, that is, where the whole of the children's shares are settled so as to be *divided among stocks, apply to the case [260 where some only are settled and some only given absolutely. That is the first question I have to consider. The second thing I have to consider, supposing those rules do apply or ought to apply, is, what is the meaning of them.

Now as regards the first point, it does appear to me that the whole of the reasoning on which the rules are founded in the case of the children's shares being settled applies to the case where some only of the children's shares are so

(*) 2 Coll., 331.

(*) 45 L. J. (Ch.), 569.

(*) Law Rep., 7 H. L., 408; 12 Eng. R., 40.

(*) Page 202.

settled. The reasoning of the rule, as it appears to me, is this, that it is absurd to suppose that a testator would give over the share of a child dying without issue to children who survived that child, when the fact of the survivorship makes no difference to the stock: a tenant for life must die at some time or other, and then, when the tenant for life is dead, the children or remoter issue take, and therefore the right of the stock is wholly independent of the parent or tenant for life surviving or not a given period. Where a testator has intended to settle the fund among his children and his descendants according to a class, it would certainly be a most extraordinary notion to attribute to him an intention that the mere fact of a parent who only takes a life interest surviving a given period is to determine the title of the descendants to succeed. That, no doubt, makes a very strong view of the case to take as against the literal interpretation; that is to say, you must not take a manifestly absurd view, leading to manifestly absurd consequences, if you can by possibility avoid it.

Then comes another rule, and that is, that you must not capriciously interfere with the ordinary meaning of the words, and further, that if you do interfere with the ordinary meaning, you must interfere as little as possible. Of course it is not capricious to interfere in the case put of a settlement, because you make that a rational result which would otherwise be altogether absurd and irrational; and it seems to me that that has been the governing principle in all cases. But then there is a second reason here, which is given by Lord Selborne, when Lord Chancellor, in *Waite v. Littlewood* ⁽¹⁾, and which has been approved of and followed by the Court of Appeal in Chancery in the case of *Wake v. 261* * *Varah* ⁽²⁾, and that is this, that the testator means that where there is a failure of a particular stock the shares of that stock shall be included in the others and go in the same manner as the original share. That is so, according to the reasoning I have already stated. But then he says: "I do not say that 'survivors' should be read as 'others.'" What he means is that you should not turn it into "others," but that there is a kind of survivorship, and the way he puts it is this. He says ⁽³⁾, "It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs, though it may very

⁽¹⁾ Law Rep., 8 Ch., 70; 4 Eng. R., 760. ⁽²⁾ 2 Ch. D., 348; 16 Eng. R., 781.

⁽³⁾ Law Rep., 8 Ch., 74; 4 Eng. R., 763.

possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention." In other words, what he means is this, that there is a kind of survivorship of the stock which is to take, and that you need not read the word "survivor" as meaning simply "other," but that you will take "surviving child" to mean "surviving descendant." In other words, you may take "surviving child" to mean a child who shall, either actually himself or herself, survive, or in respect of whom there shall be survivorship by reason of a member of the stock descended from that child being alive at the time when the gift vests. It is a modified survivorship. It is not a survivorship, strictly speaking, to the child alone, but a survivorship of the stock of which the child is a descendant; and in that sense, as I understand Lord Selborne to mean, you do attribute the meaning of "survivor" to "surviving," and you rather alter the meaning of the words "surviving child;" or if it is "survivor," you alter the word to a certain extent by making it "survivor of the stock." That I understand is what his Lordship means to express; and that, if I understand him rightly, is, I think, shown by an observation of Lord Justice James in *Wake v. Varah*, where he says ('): "Whether there ever was in the earlier cases a too lax interpretation of the word 'survivor' is, in my opinion, a matter of no consequence. A whole category of cases has now settled that 'survivor' may be read 'other,' or 'surviving stirps,' and has *settled, [262 with reasonable clearness, under what circumstances it may be so read; and no plain man not a lawyer would have had the slightest doubt in any of those cases that the real intention of the testator was effectuated thereby." The learned judge has a more confident opinion of what is right and wrong in obscure wills than I have ever been able to entertain. In the first place, it must be recollected that these wills are drawn by lawyers for the testators. They do not, in fact, express the real intentions of the testators, and what the law does is to find out what was most probably their intention. That is the rule, as I understand it, that you may take "surviving child" or "survivor" as referring to surviving stock. As I said before, there is no less reason for applying the rule to the case of those taking absolutely than to those taking as surviving stock. You may apply the rule with the same facility, because the "stock" is limited in the case of a man taking absolutely. In other words, some other members of the stock may survive, and in that

(') 2 Ch. D., 348; 16 Eng. R., 781.

way you may reconcile the rule by the light thrown on it in the case I have referred to. I think that must be considered to be the governing rule in this case, unless I can find some other intention disclosed by the words of the will itself.

Now this will is very peculiar, and, like all these obscure instruments, leaves some case unprovided for, and leaves some case which may be as absurd as any which could be imagined; and it is impossible to say that something or other might not happen which would bring forth a result not contemplated by anybody. But still one must not forget, in the first place, that in this will the word "surviving" is very frequently used in the proper sense, and the word "other" is used in respect of these children in its proper sense—an observation which perhaps is not of great weight, but at all events of some weight. Then we have this. There is a gift over in respect of some of the shares. How are the shares settled? They are settled in this way. The daughters take for life, with remainder to their children, &c. The sons take absolutely if they attain twenty-five years of age and conduct themselves well, but if they attain twenty-five years of age and do not conduct themselves well (that is, in the opinion of the trustees), then the shares are settled on 263] the sons for life, with remainder to *their children; and then there is a gift over, which is not as carefully worded as it might be, and which I take to mean this: that if any daughter dies without leaving any child, or without leaving any issue who is entitled to take, and if any son dies under twenty-five before he becomes absolutely entitled, or if not absolutely entitled, then, if he dies without issue, or without their becoming entitled to take, the share is given over. As I have said before, it is not a grammatical sentence. It has given rise to an argument on the part of Mr. Roxburgh, which I shall deal with presently more in detail, but that is the meaning I put upon it. If that is so, to whom is the share to go? It is "to go and be divided equally between my surviving children, and be paid to them or applied to their respective uses in such manner as his or their original shares are hereby directed to be paid and applied, or remain vested for his, her or their separate uses in my said executors, according to the true intent and meaning of this my will." So that it is to be paid to them or applied "to their respective use in such manner," &c. There, again, the language used is not accurate; the word "their" would refer to the children, and if it were applied to the respective use of their original shares you would have to stop; but the words

mean that the settled shares are to be applied in the same way as the original shares, so as to carry it to the use of the daughters, and I cannot possibly read the word "their" in that sentence as restricted to the children only, and I decline to read it so. I therefore read the word "children" as regards the settled shares as used to denote the representatives of the stock, and consequently there is no violence done to the words, if I am entitled so to read it, in construing the words "my surviving children" as meaning any one claiming under those children or their shares under the settlement; in other words, to read it as "surviving stock." If I read it in that way it comes to this, that the shares go to any of the children who actually survive, and that you take "surviving" to mean "surviving stock" in the case of the children being sons or daughters whose shares are to be settled; but in the case of those to be paid, they are to be paid when the sons actually survive. In that way a surviving son takes if he survives, but there is no room for a son dying before the time. I have given my meaning to the word "surviving" *without at all changing it, although I [264 have before me a class who are entitled to take under the word "children."

But then it is said that a son who dies after having attained twenty-five is absolutely entitled; but the difficulty I have in acceding to that argument is this. First of all, I cannot find any room for it without altering the word "surviving." He does not survive in any sense. In the next place, I cannot find room for it without reading "surviving" as "other" all through, which would have this result, that if there were two sons who died before attaining twenty-five, though the first son's share was given over, his legal personal representatives would take a share of the next son's share: that would be a remarkable result to attribute to any testator. The remark, no doubt, may be made that he did not think of such a thing. But then it is said that is not the construction of the gift over. Now, I must say that the gift over is very obscure indeed. I cannot read it literally, as I am pressed to do. "And in case of the death of all my said children without issue, or leaving such, and they shall all happen to die under the aforesaid age, and before they shall have received their respective shares of and in the residue of my said estate,"—then over. What is the meaning of that? It would be an extraordinary meaning to place upon those words to say, that although the gift over is only to take effect as to some children of the children who shall die before they shall have received their shares,

yet it is to take effect as to the children themselves, that is to say, that the son who has attained twenty-five and has received his share should lose it under this gift over, because that would be the effect, if I read it literally. "Before they shall have received their respective shares," read literally, refers, not to the sons, but to the issue. There is another way of reading it, and that is, to refer those words to the sons themselves. That is contrary to the grammar and absurd, and that would be to make the gift useless in the case of the death of all the children without issue who had not received their shares, and in the case of a son who attained twenty-five, his share would not go over. I am satisfied it did not go over on the construction of this will, and that it is only to go over in the case of his dying under twenty-five without issue; but that is, I must say, a very odd construction, because it is to go *over, as I read it, if he dies under twenty-five, under the first gift. It is as if he had said, "In the case of the death of all my sons and daughters, or in case they shall not attain the age of twenty-five;" and then the only gift over as regards their issue seems to be in the case of the sons dying without issue altogether. As I have not to construe this gift over it is unnecessary to find out what it really does mean. It is so difficult to construe, that I am satisfied by merely referring to it that it cannot be used for the purpose of assisting me in the construction of that portion of the will which alone I have to consider. That, I think, disposes of the arguments on the words of the will.

Then the only other argument presented to me was, that there was a general scheme in the will that the children should take the accrued shares, as they are called, in the same way as their original shares. I agree that there is a scheme that the accrued shares should go in the same manner, but I cannot find that that throws any light on what is the event on which the accruer is to take effect.

It seems to me that the only thing I have to decide upon is the meaning of the word "surviving." I am not at liberty to reject it, although I may modify its signification, and therefore that observation does not appear to me to be maintainable. Upon the whole, I think the conclusion I have already stated is the right one, at least so far as my opinion goes.

Then there were two other claimants whose claims have to be considered. First of all there is the legal personal representative of the daughter who died. The daughter who died took for life with remainder to her children under

the gift over; and I should say that the remainder of the argument on this part of the case, as was urged and truly urged by the learned counsel, was rendered necessary by the very peculiar frame of this will, and that it was meant to be the share which was first given absolutely and then afterwards settled. But then the will goes on: "And in case of the death of my said daughters or of any of my sons before they shall have attained their respective ages of twenty-five years, or of such of them as shall not have received his or their share or respective shares of and in the residue of my said estate for the reasons aforesaid, without lawful issue," &c. There is no gift over *except they (that [266 is, the daughters) shall die under twenty-five and without issue. But I cannot read it in that way. When you look at the previous provision of the will which I have referred to, it is plain that twenty-five only applies to the sons, and that the words "such of them as shall not have received their shares" apply to the sons, and then the words "without lawful issue" apply to both sons and daughters. The grammar is open to all sorts of observations, but it is a contingency as to the daughters, and you have your choice; it is either death without issue, or death under twenty-five without issue, as I said before, in the case of sons. The matter is very obscure, and cannot in any view be said to be clear.

Then the only other argument was one raised on the part of the surviving son. It appears that one son survived, and it was said that, being the only surviving child, he would take the whole. Now, the first observation to be made upon it is this, that he does not claim under the original words. It is not a gift to a "surviving child," and the man who alleges that I am to read a will literally can hardly say I am to import something which is not there. The gift is merely "to my surviving children." I agree that there are cases where by the context it has been shown that "surviving children" may include a "surviving child," and I am not going to deny that, having regard to the context here, if there had been no stock remaining this son might not be entitled; but I think it is only right to say that it is only by the context that he can claim, and therefore he who alleges that I am to read the words literally is actually driven to a context to make out his claim under the word "survivor." But my conclusion, I am bound to say, would be the same if I found the words "surviving children or child," because I have already explained I think it means not the mere survivorship of the child, but of any of the stock. Therefore I

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should have arrived at the same conclusion quite independently of the fact that the literal meaning would not assist the claimant; but, taking the whole context together, I come to the conclusion which I have stated. The result is that the fund is divisible into thirds.

From this decision the petitioners appealed. The appeal came on to be heard on the 23d of July, 1877.

267] **Fischer*, Q.C., and *Rawlinson*, for the legal personal representatives of the deceased brothers: The fund is divisible in fifths, "survivors" being read "others" by force of the gift over: *Wilmot v. Wilmot* ('); *Holland v. Allsop* ('); *In re Keep's Will* ('); *In re Tharp's Estate* ('); *In re Jackson's Trusts* ('); *Hurry v. Morgan* ('); *Badger v. Gregory* ('); *Waite v. Littlewood* ('); *Wake v. Varah* (').

Roxburgh, Q.C., and *Romer*, for the representative of Mrs. Inglis: We say the share has not gone over at all. The shares are given over on death under twenty-five without issue, and Mrs. Inglis had attained twenty-five.

[JAMES, L.J.: In gifts over reference must be had to the original gift, and I am of opinion that the attaining twenty-five only applies to sons.]

Cookson, Q.C., and *Caldecott*, *Davey*, Q.C., and *North*, for the issue of the other sisters: We say that the division should be in thirds, those children only being designated who survived by themselves or their issue. It is a survivorship by stirpes: *Holland v. Allsop*; *In re Keep's Will*; *Waite v. Littlewood*; *Wake v. Varah*. The decision in *In re Jackson's Trusts* went on a misconception of the English authorities, and it is the only case where "survivors" has been taken to mean simply "others" in the case of absolute gifts except *Wilmot v. Wilmot*, in which there were other words favoring the conclusion arrived at.

Smart (*Chitty*, Q.C., with him), for Stephen Lancaster Lucena: This brother having survived Mrs. Inglis is entitled to the whole of the fund. "Surviving" must be read 268] literally: *Badger v. Gregory* ('); *Waite v. Littlewood* ('); *Wake v. Varah* ('); *Turner v. Frampton* ('); *Leeming v. Sherrat* (').

Fischer, in reply.

(¹) 8 Ves., 10.

(²) 29 Beav., 498.

(³) 32 Beav., 122.

(⁴) 1 D. J. & S., 453.

(⁵) 1 Ir. Ch., 472.

(⁶) Law Rep., 3 Eq., 152.

(¹) Law Rep., 8 Eq., 78.

(²) Law Rep., 8 Ch., 70; 4 Eng. Rep., 760.

(³) 2 Ch. D., 348; 16 Eng. Rep., 781.

(⁴) 2 Coll., 331.

(⁵) 2 Hare, 14.

Nov. 26, 1877. COTTON, L.J., delivered the judgment of the Court (James, Baggallay, and Cotton, L.JJ.).

After reading the principal clauses of the will, his Lordship continued:

All the six children of the testator named in his will survived him. The three sons all attained twenty-five, and the provision as to settlement of sons' shares never came into operation. The question arises as to the share settled on Mrs. Inglis, one of the daughters, and her children. She died on the 9th of May, 1876, without having had any children. At the time of her death one brother was still living, one brother was dead, never having had any children, another brother was dead, but had left issue. Both the sisters of Mrs. Inglis died before her, leaving issue who were entitled under the will. The Master of the Rolls decided that Mrs. Inglis's share belongs in thirds to her brother living at her death and to the issue of her deceased sisters. Against this decision the representatives of the other two brothers appeal.

The event on which the gift to surviving children is to take effect is by no means clearly expressed, but we are of opinion that the Master of the Rolls has put a right construction on this part of the will, and that the gift to surviving children, whoever may be entitled under that gift, is to take effect as to the share of any daughter who dies without leaving any child or without leaving any issue entitled to take; and as regards the share of any son absolutely entitled on attaining twenty-five, if he dies before he attains that age and becomes absolutely entitled, or if the direction as to a settlement of his share has come into operation if such son dies without issue. But who are entitled to take under the gift to surviving children? The Master of the Rolls has decided that the surviving children are those who survive actually in *person or figuratively in issue taking an interest [269 under the will, and he so construed the words to the exclusion of a son who was dead leaving issue who take no interest under the will. The peculiarity of the case which the Master of the Rolls treated as raising a new point is, that the original shares of some of the testator's children were by the will settled and others were given absolutely. There is no authority in such a case for attributing to the words "surviving children" the construction which the Master of the Rolls has given to these words. It is true that Lord Selborne, in *Waite v. Littlewood* (1), expressed an opinion against construing "survivors" simply "others," and

(1) Law Rep., 8 Ch., 74; 4 Eng. R., 768.

also expressed an opinion that some idea of survivorship must be supposed to exist in the minds of testators when they used the word "survivor." But the form of the gift in that case was very different from that in the present case; there the gift was to his, the testator's, surviving daughters for life, and after their deaths to their children, and probably Lord Selborne is in his judgment rather referring to what he thought might have been an idea floating in the testator's mind than laying down a rule that in a case like the present, where some shares are settled and others are not, the word "survivors" is to receive a construction which gives it the effect attributed to it by the order of the Master of the Rolls. Some expressions in the judgment in *Doe v. Wainwright* (') may also be referred to as supporting the Master of the Rolls' construction. But in that case the limitation to those surviving in person or in issue was referred to as to the effect of the cross-remainders implied in that case rather than as the construction of the words used. In this case the shares of sons who conducted themselves with propriety are indefeasibly vested at twenty-five, and in our opinion on this will it would be more reasonable to say that the idea in the testator's mind as regards sons in using the word "survivors" had reference to those who survived the period when their shares became indefeasibly vested than to attribute to the word a construction which would give to the children of a son who did not conduct himself with propriety an interest under the gift to surviving children, while it gives no interest to a deceased son who had conducted himself with propriety. The fact of 270] shares being settled, and the *fact of the ultimate gift over being only to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as showing that "survivors" is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift over standing as it does, there had been no settlement of the daughters' shares, we are of opinion that the word "surviving" would not have received its strict construction, and must have been construed "other"; and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word "surviving," as a matter of construction, the meaning of "survivors" in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the

(') 5 T. R., 427.

shares of all the children, and not of some only, had been settled.

We are of opinion that the decision of the Master of the Rolls was correct so far as he held that "surviving" could not receive its strict construction, but that he was wrong in attributing to this word the meaning which he has given to it. We think "surviving" must be construed "other," and that the personal representatives of the two sons who died before Mr. Inglis are entitled to share in the fund in question, which must be divided into fifths, and not into thirds.

Solicitors: *T. Frame; Dimond & Son; Paterson, Snow & Burney; Quekett; W. Eley*, agent for J. R. Rignall, Enfield.

[7 Chancery Division, 271.]

V.C.B., July 8: C.A., Nov. 27, 30, 1877.

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[1877 G. 112.]

Injunction—Breach of Covenant—Use of Land restricted to Purposes of Private Residence—Charitable Institution.

The erection of a building, to be used for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions, *held* to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."

Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance.

Roper v. Williams (1) distinguished.

The decision of Bacon, V.C., reversed.

MOTION to restrain an alleged breach of covenant against the erection of any house or building to be used or occupied otherwise than as a private residence, by the proposed erection of a house where 100 girls were to be boarded, lodged, and educated in connection with a charitable institution for the daughters of missionaries.

In 1869 the plaintiff and W. J. Thompson, as trustees on behalf of themselves and others, purchased fifty-seven acres of land near Sevenoaks, with a view to reselling it for building purposes.

In May, 1872, the plaintiff and Thompson sold to the defendant Chapman four acres of the property, and by a deed

(1) T. & R., 18.

of even date with the purchase deed, Chapman, in pursuance of his contract, covenanted with the vendors, as trustees for the owners of the estate, that he, Chapman, his heirs and assigns, "will not at any time erect or build or suffer to be erected or built upon the land purchased by him more than four messuages or dwelling houses, and also that no messuage, dwelling house, or other building so to be erected or built upon the same land shall at any time hereafter 272] *be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."

The remaining plots of land were sold subject to similar restrictive covenants, and one of these plots adjoining that sold to Chapman was purchased by the plaintiff German, who had built upon it a large house as a residence for himself.

In February, 1877, Chapman contracted with the trustees of the Institution for the Education of Daughters of Missionaries, which was established at Walthamstow, and supported by voluntary contributions, for the sale to them of his four-acre plot, the sale being stated to be "subject to certain restrictive covenants as to buildings."

In purchasing this four-acre plot the committee of the institution intended to erect upon it a large building capable of holding 100 girls, daughters of missionaries, who were to be boarded, lodged, and educated.

This proposed erection was opposed by the plaintiff, and the owners of adjoining plots, on the ground that it would be a violation of the covenant contained in the deed of May, 1872, and also would materially interfere with the privacy and enjoyment of their land.

On the 15th of May, 1877, the plaintiff commenced an action against Chapman, the trustees of the institution, and Thompson, to restrain them from building or permitting to be built on the four-acre plot any building intended, or adapted only for use and occupation as a school or institution, or otherwise than as a private residence, and from doing any other act in contravention of Chapman's covenant contained in the deed of May, 1872.

On the 8th of July an injunction was moved for before Vice-Chancellor Bacon, and the motion was by consent treated as the trial of the action.

Evidence was adduced on behalf of the defendants for the purpose of showing that the plaintiff had verbally assented to the erection of the school before the committee had entered into their contract, but in the opinion of his Lordship this contention failed.

It was also elicited in the cross-examination of the plaintiff that the vendors had recently given permission to a purchaser to open a boarding school for boys on the estate, near the boundary of the *property, which was capable of [273 accommodating about eighteen boys.

Sir H. Jackson, Q.C., and *E. Thurstan Holland*, for the plaintiff, cited *Kemp v. Sober* ⁽¹⁾; *Johnstone v. Hall* ⁽²⁾.

Rigby, for the defendants Chapman and Thompson, and *Horton Smith, Q.C.*, and *Whitehorne*, for the trustees of the school, were not called upon.

BACON, V.C.: In my opinion the plaintiff makes no case which entitles him to the interference of the court. The restriction contained in the covenant is against using any part of the premises otherwise than as and for a private residence only, and not for any purpose of trade. I cannot conceive that there ought to be or is any doubt about the meaning of those words. The second branch of the proposition, "not for any purpose of trade," seems to be introduced only for the purpose of explaining what a private residence is. The real restriction is against occupying the premises for any other purpose than a private residence, and if it is intended by the defendants to occupy this land for any other purpose than a private residence, I am of opinion the plaintiff would be entitled to restrain them. But I am of opinion that there is no pretence for saying that this institution which is to be removed from Walthamstow to Sevenoaks is any other than a private residence, or ever will be anything other than a private residence. It is an institution in which charitable donors put themselves *in loco parentis* to the children they are to educate. They buy and build a house for these children as their children, and for their private residence this land and this house are dedicated. What is there against the covenant in this case? There is no trade as there was in *Kemp v. Sober* and in *Johnstone v. Hall*. There is no emolument derived from it. On the contrary, the gentlemen dispose of their own charitable donations for the benevolent purpose mentioned, and is it to be said that this is not a private residence? What is it if it is not? What gives it any character of publicity? Children are received here; *it is said they may amount to a hundred. [274 What can that signify? What can it signify if a medical practitioner says that diseases are likely to break out in houses in which there may be a hundred children. So they are in houses where there are only two children, or only one. That does not affect the question in the slightest degree;

(1) 1 Sim. (N.S.), 517.

(2) 2 K. & J., 414.

it cannot be disputed that if the defendants in this action had a hundred children of their own, which is not likely to happen in this country where polygamy does not exist, that they would not be able to build a house for their children, and what does it signify if it is partly for them to receive education and instruction. If in the tumults that disturb the world now some Turkish Pacha transported himself and his seraglio, and his hundred children to this country, and built a house for their private residence, could it be said it was an infringement of the covenant? It may be said this is an absurd illustration, but it is necessary sometimes to resort to absurd illustrations when a man says that his expectations are disappointed, and what he contracted for is withheld from him or taken away from him by the public character of this school. There is no ground whatever for his statement. I must say, however, that I see with great dissatisfaction the manner in which this case has been met. An attempt to establish an assent on the part of the plaintiff is put forward. In my opinion no assent has been given which binds the plaintiff. I must refuse this application, and I must refuse it with costs, because I think it is unfounded; but I must at the same time order that the plaintiff shall not pay the costs which have been occasioned by the affidavits filed by the defendants. On the facts alleged by the plaintiff there never was any dispute between the parties which could properly affect the decision of the court. The action will therefore be dismissed with costs.

From this decision the plaintiff appealed. The appeal was heard on the 27th of November, 1877.

Sir H. Jackson, Q.C., and *E. Thurstan Holland*, for the appellant: This building is to be used for the purposes of a public charity supported by voluntary contributions, and [275] cannot come within the *description of a private residence: *Doe v. Keeling* (¹); *Kemp v. Sober* (²); *Johnstone v. Hall* (³). The only residents will be a matron and teachers who earn their living by the discharge of their duties on the spot. A private residence means the residence of a family. This is not the residence of a family, but a public establishment. To use negative words, "not for purposes of trade," would not have been sufficient, such words would not prevent the erection of a private lunatic asylum: *Doe v. Bird* (⁴). In *Wickenden v. Webster* (⁵) a

(¹) 1 M. & S., 95.

(²) 2 A. & E., 161.

(³) 1 Sim. (N.S.), 517.

(⁴) 6 E. & B., 387.

(⁵) 2 K. & J., 414.

covenant similar to the present was held to prohibit the use of a building as a school. The principle of these cases was acknowledged in *Johnstone v. Hall*, and the bill in that case was only dismissed because the plaintiffs claimed as reversioners.

Freeling (*amicus curiæ*) said that in that case the relief prayed was subsequently given, when a bill for that purpose was filed by the tenant in possession.

Rigby, for Chapman and Thompson, took no part in the argument.

Horton Smith, Q.C., and *Whitehorne*, for the trustees of the school: One of the covenantees refuses to concur.

[JAMES, L.J.: That is of no consequence. If either of them wishes to have the benefit of the covenant he is entitled to it.]

Then we say, in the first place, that this is not a school. It is a home for the children. But if it is, the establishment of a girls' school is not a nuisance: *Baines v. Baker* (*). In some cases the question of nuisance has been improperly mixed up with the question of breach of covenant: *Doe v. Keeling*; *Harrison v. Good* (*). Secondly, as to the construction of the covenant, the court ought not to look at the surrounding circumstances, *Kemp v. Bird* (*); but ought to construe the covenant strictly: *Pease v. Coats* (*). The covenant in the present case consists of two *parts, [276 namely, that no building should be occupied otherwise than as a private residence, which is general; and that no building should be occupied for purposes of trade, which is particular; and the general clause should be interpreted and controlled by the particular. In keeping this school the committee are not exercising a trade: *Jones v. Thorne* (*); *Doe v. Bird* (*). It is in fact a private residence, for the public has no right of using it. No children are admitted except those selected by the committee: *Wickenden v. Webster* (*). We also contend that the plaintiff has waived his right to enforce the covenant by giving permission for a boys' school to be established on the property. All the purchasers have to give a similar covenant, and it is entered into for the benefit of all; therefore a waiver as to one affects all the others: *Peek v. Matthews* (*); *Roper v. Williams* (*); *Duke of Bedford v. Trustees of British Museum* (**).

JAMES, L.J.: I am sorry to say I cannot take the view

(*) Amb., 158.

(*) Law Rep., 11 Eq., 388.

(*) 5 Ch. D., 974; 22 Eng. R., 291, 585.

(*) Law Rep., 2 Eq., 688.

(*) 1 B. & C., 715.

23 ENG. REP.

(*) 2 A. & E., 161.

(*) 6 E. & B., 387.

(*) Law Rep., 3 Eq., 515.

(*) T. & R., 18.

(**) 2 My. & K., 552.

that the Vice-Chancellor has taken of the meaning of this covenant; and it appears to me that this case is to be decided without any reference at all to that long bead-roll of cases which it seems to be always thought necessary to cite in every case of this kind. The case must be decided upon the plain meaning, whatever that may be, of a few English words, which we have got before us. The draughtsman who prepared the covenant seems to have thought that it was safer to use few words, and not to dilute those words, or to complicate them with a long string of other words, by reason of which difficulties have been created in some of the cases to which we have been referred. In construing these words we must, no doubt, always have regard to this, that they are restrictive words, restricting the common law right of the owner of the land, of the person to whom the land has been granted, and therefore if there be any ambiguity in the words, or any reasonable doubt as to their meaning, this must be taken into consideration: so that the plaintiff coming to seek the assistance of the court must bring his 277] *case within the plain meaning of the contract which he is seeking to enforce.

Now what are the words here? The words are, "and also that no messuage, dwelling house, or other building so to be erected or built on the same land, shall at any time or times hereafter be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade." It has been contended before us that those latter words "and not for any purpose of trade" are in some way to be used, or may be considered as restricting or defining or limiting the former words, that is to say, that the sole object of all those words to "be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade," is simply to say it shall not be used for any purpose of trade; because unless it goes to that extent it appears to me it is impossible to draw any line. If it does mean that the building shall not be used for any purpose of trade, and if it is not used for any purpose of trade, then it may be used for any other purpose whatever; that would be striking out entirely from the covenant the words "used or occupied otherwise than as and for a private residence only." I am of opinion that you cannot, upon any principle of construction, use the distinct words of the second clause so as entirely to strike out the former words from the covenant. Then, if you cannot give that effect to the words "for any purpose of trade," you have to construe the words themselves which are, "used

or occupied otherwise than as and for a private residence only," and we must construe them according to their ordinary meaning. What is the meaning in ordinary language of those words? What is the meaning of using the house as a private residence? It is not necessary to say what is or what is not in every case a private residence, but to my mind, with all deference to the opinion of the Vice-Chancellor, who took a different view, it is impossible to say that in the ordinary use of English language the using of a place for a large institution (although a very charitable and beneficial institution) for the reception of one hundred girls to be lodged, boarded, and taught at that place, is using it as a private dwelling house. To my mind such an institution is no more a private residence only than a club of gentlemen or a working men's club, or any other *establishment [278 of that kind, where a great number of persons are brought together. Whose private residence can it be said to be? It is not a question you can argue upon any philological considerations, or any other considerations except upon the plain meaning of the words as understood by the particular individual who applies his mind to it. I have arrived at the conclusion, and I am bound to say without any hesitation, that such an institution as this is not in any sense of the word a mere private residence only, and if that be so, this is an attempt to use this building otherwise than as a private residence.

Then it is said that there has been some waiver of some of the covenants on a small piece of land, part of the same estate at some distance off, and therefore that the whole thing is at an end. It is not very convenient to have such a question as that raised merely upon a casual answer given on cross-examination. It is nothing more than this, that when the witness is in the box he is asked, "Have you not waived something?" and he said he had waived a similar covenant as to a piece of land at some distance off in another corner of the estate. Then it is said, "You having done that, notwithstanding the covenants which were entered into with other people in subsequent grants, the whole thing is at an end." And for that proposition the well known cases of *Roper v. Williams* (') and *Duke of Bedford v. Trustees of the British Museum* (") have been cited. It would be a monstrous thing if it were the rule of this court that upon such an estate as the Westminster estate in London, every one of the houses in Belgrave Square and Eaton Square is freed from any restrictive covenant of this kind

(') T. & R., 18.

(") 2 My. & K., 552.

because in some remote alley or back street upon the same estate somebody or other has been permitted to do something which is prohibited by his covenants. It can never be the meaning of those cases that such a conclusion should be arrived at. The principle, no doubt, is that which is expressed in *Peek v. Matthews* (¹), which shows exactly upon what ground these cases proceeded, and which in that respect was perfectly right. The Vice-Chancellor in that case, in giving judgment, says: "In *Roper v. Williams* the court, 279] in considering whether it would grant specific *performance of a covenant of this description, which is framed only to provide uniformity in the mode of building, so that the enjoyment which springs from regularity in a series of dwellings may be preserved, held that he who seeks to enforce a covenant of this kind must suffer no such breach of the stipulation as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement." That is to say, if there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighborhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harrassing and annoying some particular man where the court could see he was not doing it *bona fide* for the purpose of effecting the object for which the covenant was originally entered into. That is very different from the case we have before us, where the plaintiff says that in one particular spot far away from this place, and not interfering at all with the general scheme, he has, under particular circumstances, allowed a waiver of the covenant. I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind from several persons could not do an act of kindness, or from any motive whatever relax in any single instance any of these covenants without destroying the whole effect of the stipulations which other people had entered into with him. For instance, in this very case application was made to the plaintiff for a waiver. It would be monstrous to suppose, if he had acceded to that application, that therefore he was, by the mere act of kindness to the defendants themselves, destroying the whole benefit of the covenants as to all the

(¹) Law Rep., 3 Eq., 515, 517.

rest of the estate. It appears to me it is impossible to apply the principles of *Roper v. Williams* (*) and *Peek v. Matthews* (†) to such a case as this; therefore I think that there is no answer to the case which the plaintiff has made out, that the intended use of this property would be a violation of the express *covenant entered into, and the plain- [280] tiff is therefore entitled to the injunction asked.

BAGGALLAY, L.J.: The question for present decision is whether the restrictive words contained in the covenant of Chapman's purchase deed apply to such an institution as that which the respondents propose to establish upon the piece of land conveyed by that deed. The first question of course is, what is the proper construction to be put upon the covenant in question apart from any application of the words? Now, the covenant is that no building upon this piece of land shall "be used or occupied otherwise than as and for a private residence, and not for any purpose of trade." It has been contended that the effect of the two branches of the sentence taken together is to altogether do away with the force and meaning of the first branch, which restricts the use to a private residence only, and to limit the operation of the covenant to a mere restriction from using the building for any purpose of trade. It is impossible, on any principle of construction, to adopt this view of the case. It appears to me that you have first got the restriction from using the piece of land otherwise than as and for a private residence, and that then, possibly from abundant caution, the other words are introduced.

It is possible to conceive cases in which there might be a question whether, consistently with the use of it as a private residence only, some small matter of trade might not be carried on upon it, and therefore the additional words are added, "and not for any purpose of trade." I think that that construction is made still more clear if we depart from the particular words used here and look at what Mr. Thurstan Holland drew our attention to, namely, the surrounding circumstances—surrounding circumstances to be ascertained, not from sources extraneous to the deed, but which you find upon the face of the deed itself, which tells you that this piece of land is to be built upon with a certain number of houses, of not less than a specified value, all pointing to the occupation, in the neighborhood of the town of Sevenoaks, of a piece of land for residential purposes, and residential purposes only. If this be the true construction of the covenant, it *appears to me impossible to say that the establish- [281]

(*) T. & R., 18.

(†) Law Rep., 3 Eq., 515.

ment of such an institution as it is proposed to establish on this piece of land, and the carrying out of its objects, would be a use or occupation of the building as a private residence only. It is certainly contrary to our common understanding and to the common acceptance of the words, and it appears to me to be entirely contrary to the object and purport of the whole deed. If it were necessary to allude to authorities on the subject, I think the fact that this institution would come within the restrictive words of the covenant is entirely in accordance with the decision of the Court of Queen's Bench in *Wickenden v. Webster* (¹), and with the judgment pronounced by the three judges, and in accordance also with the view expressed by Vice-Chancellor Wood in *Johnstone v. Hall* (²), when the case was before him in the first instance; and we are informed by Mr. Freeling that he acted upon it also when the case came before him on a second occasion.

Then it is said that in this case there has been a waiver by the plaintiff in respect of these restrictive covenants as regards another piece of the property in question, and that such waiver debars the plaintiff from asserting a right here to enforce by injunction the performance of the covenant. The cases of *Roper v. Williams* (³) and *Peek v. Matthews* (⁴) have been relied upon. Those cases are very different from the present case. In both of them the object of the restrictive covenants was to secure the erection, in the one case of a row of houses, and in the other case of a succession of detached buildings; and in the one case the houses in the row were to be all of a similar character, and in the case of the detached buildings they were all to be built at a certain uniform distance from the road, and also of a uniform character. Upon an application for an injunction, it was held, that, inasmuch as the person seeking to enforce the covenant by injunction had himself permitted a departure from the covenant by allowing a portion of the land to be built upon in a way inconsistent with the covenant, he was not entitled to come to the court and ask for relief by injunction, but was left to any remedy he had at law upon [282] the covenant. I should observe, as *regards *Roper v. Williams* (³), that the decision was given in that case not only on the ground of the permission to erect buildings, contrary to the covenant, upon another portion of the land, but also in consequence of the delay of the party in coming to the court for relief. Here there is a very different case.

(¹) 6 E. & B., 387.

(²) 2 K. & J., 414.

(³) T. & R., 18.

(⁴) Law Rep., 3 Eq., 515.

There is nothing like an interference with uniformity of building or style of building, but permission has been given that at the extreme portion of fifty-seven acres of land a house may be built, and when built may be used otherwise than for a strictly residential purpose, according to the view which we take of the case. I assent, as a general principle, to the view which has been expressed by the Lord Justice as to questions of this sort being raised on cross-examination, but in this case there is probably this explanation, that it was not the hearing of the cause; if it had been brought to a hearing, this point would have been raised by answer, but when the motion for the injunction was heard it was treated as the hearing.

THESIGER, L.J.: I also think that this appeal ought to be allowed. We ought to attribute to the words "private residence only" their ordinary and popular significance, unless we can collect from the covenant a clear intention that some special or limited meaning should be attached to them.

Now, taking the words by themselves, I am clearly of opinion that an institution such as that which is the subject of the dispute in the present case cannot, in ordinary and popular parlance, be taken to come within the words "private residence only." But it is contended on the part of the defendants that you are to limit and to cut down the meaning of the words "private residence only" by the words following that sentence, "not for any purpose of trade." As regards that contention, in the first place it seems to me that it requires you to do violence to the express language of the clause, because we find nothing in the clause which shows an indication that the words "not for any purpose of trade" are to be a definition of the words "private residence only." On the contrary, we find them following the conjunction and according to the ordinary grammatical meaning of the words, constituting *and [283 forming a separate branch of the sentence. Secondly, it seems to me that, instead of merely cutting down the words "private residence only," if effect were given to this contention, you would be cutting out those words altogether, because the meaning of the sentence then would be simply this—that the premises should not be used for any purpose of trade. And in the third place, it seems to me that that contention is founded upon an erroneous impression that the words "not for any purpose of trade" are the antithesis to the words "private residence only," whereas, if you look to the whole of the sentence in which the latter words are

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contained, you will find that the sentence itself contains the antithesis. The sentence is "also that no messuage, dwelling house, or other building so to be erected or built on the same land should at any time or times thereafter be used or occupied otherwise than as and for a private residence only." Therefore the antithesis to "private residence only" is that word "otherwise," and if you amplify that sentence, and read it in a different way, every messuage, dwelling house, or other building so to be erected shall be used as a private residence and not for any other purpose, the fact that the word "otherwise" is the antithesis to "private residence only" is obvious and clear; and if the sentence be read in that way, it is also, as it seems to me, obvious and clear that the words "not for any purpose of trade" are an addition to the sentence, and not, as has been contended, a mere definition of the words "private residence only."

Upon the question of waiver, I agree with what has been said by the other Lords Justices, and I have only this to add, that it seems to me impossible, even giving the fullest effect to the decisions of the court cited to us, to say that the allowance, upon the edge of a property consisting of fifty-seven acres of land, of a school, which is a private school for eighteen boarders, should put an end to the restrictive covenant over the whole of the fifty-seven acres, and allow anybody to place, not a school of the description in respect of which the restriction has been relaxed, but an institution of a public character, in which are to be boarded, lodged, and educated as many as 100 girls.

Solicitors: *Vizard, Crowder & Co.*, agents for *Holcroft, Knocker & Holcroft*, Sevenoaks; *Druce & Co.*; *Nash & Field*.

See note to *National, etc., v. Prudential, etc.*, *ante*, pp. 331, 332-3.

A condition in a deed conveying land, that intoxicating liquors shall never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises, and that if this condition be broken by the grantee, his assigns or legal representatives, the deed shall become null and void, and the title to the premises shall revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy.

Upon breach of the condition the grantor had a right to treat the estate as having reverted and bring ejectment for the premises, without previous en-

try upon them or demand for their possession, such entry or demand being unnecessary under the statute of Colorado, where the premises are situated: *Cowell v. Colorado Springs Co.*, 6 Weekly Jurist, 680, Sup. Ct. U. S.; *Plumb v. Tubbs*, 41 N. Y., 442; *O'Brien v. Wetherell*, 14 Kansas, 616.

See *Doe v. Keeling*, 1 Maule & Selwyn, 95.

The demandant, being owner of a parcel of land with a dwelling house thereon, adjoining on the north to land with a dwelling house thereon belonging to his sister, facing to the south, conveys to the tenant's grantor in fee simple, "provided, however, this conveyance is upon the condition, that no

windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof." After the sister has conveyed her land to a stranger, the tenant mortgages by a deed reciting the foregoing provision, and afterward while remain-

ing in possession makes windows in the north wall.

Held, that the above clause was a condition, and not a covenant; that it was a valid condition, and that such breach of it worked a forfeiture of the estate, and gave the demandant a right to re-enter: *Gray v. Blanchard*, 8 Pick., 288.

[7 Chancery Division, 282.]

C.A., Nov. 30, 1877.

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[1876 B. 1.]

Pleading—Defence—General Denial—Rules of Court, 1875, Order XIX, rr. 17, 20, 23.

The statement of claim in an action for specific performance stated that the predecessor in title of the plaintiff, by his agent lawfully authorized, signed an agreement with H., the predecessor in title of the defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that H., the predecessor in title of the defendant, was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by H. or any person by him lawfully authorized:

Held (affirming the decision of Fry, J.), that, under the statement of defence, the defendant could only enter into evidence to show the unsoundness of mind of H., and could not enter into evidence to show that the agent was not duly authorized.

THIS was an appeal from a decision of Mr. Justice Fry (*).

The action was brought for the specific performance of an agreement, in writing, to grant a lease of certain freehold premises alleged to have been made on the 20th of February, 1865, between the defendant's predecessor in title, John Hutley, under the hand of his agent thereunto lawfully authorized, by writing, and the plaintiff's predecessor in title, Anthony Byrd. The plaintiff also claimed damages for breach of the agreement.

The 1st paragraph of the statement of defence was as follows:—

The defendant denies that on the 20th of February, 1865, the defendant's predecessor in title, J. Hutley, agreed, by writing, under the hand of his agent thereunto lawfully authorized, by writing, with the plaintiff's alleged predecessor in title, Anthony Byrd, to grant to the said Anthony Byrd a lease of the said freehold premises. On the 20th of February, 1865, the said J. Hutley was of unsound mind, although not so found by inquisition, and he was wholly incapable of lawfully authorizing, and did not lawfully au-

(*) 5 Ch. D., 781; 22 Eng. R., 457.

thorize, any person as his agent to sign any such agreement as in the plaintiff's statement of claim alleged.

The defendant then denied several other allegations, and 285] *alleged that the plaintiff was in possession as yearly tenant only; and the 5th paragraph of the defence is as follows: "The defendant denies that any agreement for a lease of the said premises to the plaintiff or his alleged predecessor in title was ever made or signed by the said J. Hutley, or any person by him lawfully authorized;" and the defendant claimed the benefit of the Statute of Frauds.

At the trial of the action Mr. Justice Fry was of opinion that under these pleadings the defendant could only enter into evidence to show the unsoundness of mind of J. Hutley, and could not enter into evidence to show that he was not authorized as agent to make the agreement. His Lordship refused to give the defendant leave to amend the statement of defence.

Evidence having been adduced as to the alleged unsoundness of mind of Hutley, the judge was of opinion that he was not of unsound mind, and accordingly gave judgment in favor of the plaintiff for specific performance.

The defendant appealed from this judgment.

Fischer, Q.C., and *W. W. Cooper*, for the appellant: The pleadings are sufficient to raise the issue that the agent had no authority to make the agreement, as well as the issue of unsoundness of mind. The 1st paragraph raises the latter issue, and the 5th raises the issue of authority. This form of pleading was held good in *Whaley v. Bagnel* (*). If pleadings are to be construed so strictly the old system of special pleading will be restored. There was nothing in the pleading in the present case to mislead the plaintiff. If the court should hold the pleadings insufficient, we ask for leave to amend in order to raise the issue of authority.

Cookson, Q.C., and *B. Eyre*, were only called on upon the question of amendment. They referred to Rules of Court, 1875, Order XIX, rules 17, 20, 23: and *Thorp v. Holdsworth* (*).

JAMES, L. J.: I am of opinion that the statement of defence was not sufficient to raise the issue of want of authority, 286] ity, and that the judge who *tried the action was right in not admitting evidence on that point. There can be no doubt that on the pleadings the substantial issue which the defendant desired to raise, the insanity of the alleged agent, would have gone to the whole root of the

(*) 1 Bro. P. C., 845.

(*) 3 Ch. D., 637.

matter ; and I am of opinion that the pleadings are confined to that issue.

With respect to the leave to amend, I think that we ought not to interfere with the discretion of the judge in the court below in such a case. If a defendant were to be at liberty to put in a defence inconsistent with the rules of pleading, and then at the trial get the case to stand over in order to put in a new defence, the consequences might be very prejudicial. If a proper case for amendment had been made out at the trial, the judge, who had all the facts before him, might have given leave to amend at the time, and have proceeded to try the action at once. But it is a matter entirely in the discretion of the judge, with which this court ought to be very chary in interfering. The appeal must be dismissed with costs.

BAGGALLAY, L.J.: I agree with Mr. Justice Fry that the main object of the defendant's pleading was to set up the question of the unsoundness of mind of the alleged agent. This statement of defence was contrary to the spirit of the Rules of Court, Order XIX, rr. 17, 20, 23. The object of these rules was to insure a proper statement of the issues intended to be raised in the defence, in order that the other party might know to what to direct his evidence. As far as I can see, the unsoundness of mind of Hutley was the substantial ground of defence relied on by the defendant. Possibly the 5th paragraph, if taken by itself and without reference to any other part of the statement, might have been held sufficient to raise the alternative issue now sought to be raised ; but looking at it in connection with the other paragraphs of the statement of defence, I am satisfied that the unsoundness of mind was the only substantial issue raised.

As regards the question of leave to amend, it is a matter entirely in the discretion of the judge ; and even if I had thought it a fit case for amendment, as at first I was disposed to do, I should be unwilling to interfere with that discretion.

*THESIGER, L.J.: I am of the same opinion. I [287 should always be unwilling to deprive a defendant of any particular defence if there had been a mere slip in the pleading, and if the defence desired to be raised was a substantial defence ; and in such a case I should be disposed to allow an amendment. But we must bear in mind that when the case was before Mr. Justice Fry he had all the facts before him, and he knew that the point which the parties had come to try was the unsoundness of mind of Hutley. This being so, I

do not think that we ought to interfere with the discretion of the judge in refusing leave to amend.

The question remains whether the defendant has sufficiently pleaded in his statement of defence the point which he now desires to raise. I agree with the learned judge that he has not done so. A variety of matters are set forth in the statement of claim showing the plaintiff's cause of action, namely, that the agreement was made, that it was in writing, and that it was made by an agent properly authorized. Under the old common law system of pleading, all these matters necessary to be stated might have been put in issue by pleading the general issue, which would have had the effect of traversing all the particular allegations. But that system of pleading, while it tended to raise clear issues, had the disadvantage that plaintiffs had no means of knowing what the real point to be tried was. The new rules were expressly framed to prevent that, and to make the defendant take matter by matter and traverse each of them separately. Has the defendant done this in the present case? He seems to me to have fallen back into the old system of common law pleading, except that instead of pleading *non assumpsit* he has amplified that plea by traversing as a whole the several allegations of the plaintiff in such a manner as, but for the present rules of pleading, would put him in the position of being able to disprove any one allegation without the others. I think it is a question whether the 1st paragraph of the defence ought not to have been struck out as embarrassing. But I think that on a fair construction of that paragraph the defendant may be taken to have meant that the agreement was not made by an agent properly authorized because the principal was of unsound mind; and 288] therefore I agree with *the judge that the issue of the authority of the agent, apart from the incompetency of the principal, was not raised by that paragraph. As to the 5th paragraph, I at first thought that there was some force in Mr. Fischer's argument that it sufficiently raised the question of agency, but when that paragraph is looked at attentively, it is clearly contrary to the rules which have been drawn up to prevent that kind of pleading. There is no specific fact traversed by that paragraph, but, as in the case of the 1st paragraph, so the 5th is also open to the remark that under it the defendant might have set up either, first, that there was no agreement in fact, or secondly, that it was not in writing, or thirdly, that the agent had no authority, or fourthly, that the principal was not competent to give authority, being of unsound mind—the very thing that

the Rules were intended to prevent. As the unsoundness of mind was the substantial defence set up, I think we must read the statement of defence altogether as referring to that ground of defence, and must conclude that it does not raise the general issue that there was no agreement by an agent duly authorized.

Solicitors for plaintiff: *Evans & Eagles.*

Solicitor for defendant: *J. L. Morris.*

[7 Chancery Division, 288.]

M.R., Aug. 8: C.A., Dec. 1, 3, 1877.

COOPER V. MACDONALD.

[1855 C. 117.]

Married Woman—Equitable Estate Tail—Separate Use—Restraint on Alienation—Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77—Curtesy.

A married woman, under the limitations of a will made in 1846, was equitable tenant in tail to her separate use of certain freehold estates. By a clause in the same will she was also restrained from alienation of the rents and profits. Her husband became bankrupt, and after his order of discharge joined with his wife in barring the equitable entail and limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, and the husband's assignees claimed the husband's estate by curtesy:

Held (affirming the decision of Jessel, M.R., that the restraint on anticipation did not prevent the wife from barring the entail and acquiring the *equitable {289 fee; and that the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate.

Per JESSEL, M.R.: It is now settled that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy.

WILLIAM MACDONALD, by his will, dated the 5th of December, 1846, gave his residuary real estates to four trustees upon trust as to certain parts thereof for his son Charles for life, with remainder to his children as tenants in common in tail; and in default of such issue in trust for the testator's other children as tenants in common in tail; and as to certain other parts to his other sons, Thomas and Edward, and his daughters, Adelaide, Angelina, and Emily, for similar estates, with similar gifts over on failure of their issue to the testator's other children as tenants in common in tail. And the testator directed that upon each of his daughters attaining the age of twenty-one years his trustees should pay the rents and annual income of the said hereditaments and other premises, whether original or accruing, thereinbefore devised for her benefit, from time to time as they should accrue, into the proper hands of his said daughter, or permit the same to be received by her for her sole use, free from the

control, debts, or engagements of her husband, as a separate and inalienable provision, without power of alienation or anticipation, and for which the receipt alone of such daughter, whether covert or sole, should be a sufficient discharge to his said trustees. And the testator also declared that the interest or benefit which any female might take under his will should be held, received, and enjoyed by her for her sole and separate use, independent of the debts, interference, or engagements of any husband she might marry.

The present suit was instituted for the administration of the estate of the testator.

The testator's children, Charles, Thomas, Edward, and Angelina, died without issue, in consequence of which their portions of the testator's real estate devolved upon his other daughters, Adelaide, the wife of James Cooper, and Emily, the wife of H. W. Matthews, as equitable tenants in common in tail for their separate use.

James Cooper was adjudicated bankrupt on the 11th of 290] May, *1864, and obtained his order of discharge on the 25th of May, 1865.

On the 21st of July, 1875, Adelaide Cooper executed a disentailing deed, to which her husband was a party, of the equitable entail in her moiety of the real estates, which had formerly belonged to her deceased brothers and sister, and limited it to Edwin Earl in trust for her separate use in fee.

Mrs. Cooper died in December, 1876, having by her will, made on the 22d of July, 1875, devised all her real and personal estate for the benefit of her children.

An application had been made in chambers by Mrs. Cooper's children for an order for maintenance out of the real estates devised by their mother's will, which was opposed by the assignees under the bankruptcy on the ground that James Cooper was entitled to the estates during his life as equitable tenant by the curtesy, and that his interest had passed to his assignees. The matter was adjourned into court, and came on for hearing before the Master of the Rolls on the 8th of August, 1877.

Chitty, Q.C., *Davey*, Q.C., and *Speed*, for the applicants: Mrs. Cooper, having an equitable estate tail as an "interest or benefit" settled to her separate use by the last clause of the will, had power to dispose of that estate tail just as if she had been a *feme sole*, including a power to bar the entail. She had in fact a complete right of alienation as incident to her separate estate, *Taylor v. Meads* ('); and that right she exercised by the disentailing deed, by which the property

(') 4 D. J. & S., 597.

was again settled to her separate use. Being thus entitled to the equitable fee simple for her separate use, she was enabled to dispose of the property by will, and, according to *Moore v. Webster* (¹), her husband could have no claim as tenant by the curtesy. However, in the subsequent case of *Appleton v. Rowley* (²), Vice-Chancellor Malins held, on the contrary, that a husband was entitled by the curtesy to real estate of which his wife was equitably seised in fee, but in that case the wife died without having made any disposition of the estate, which was not the case here. What his Lordship there says is precisely *applicable to our case: [29] he says (³), "The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation."

[JESSEL, M.R.: I see that Mr. Lewin, in his treatise on Trusts (⁴), treats it as settled that the husband is entitled by the curtesy where there is a trust for the separate use of the wife in fee.]

Lord Hardwicke decided the point both ways, for in *Roberts v. Dixwell* (⁵) he decided in favor of the curtesy, and in *Hearle v. Greenbank* (⁶) against it. In the notes to Coke upon Littleton by Hargrave and Butler (⁷), it is said that up to that time courts of equity had allowed curtesy out of trusts. In *Bennet v. Davis* (⁸) it was held that where the husband had become bankrupt he took his estate by the curtesy merely as trustee, not for the creditors but for the heirs of the wife.

There is nothing in the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) to prevent a married woman who is tenant in tail to her separate use from barring the entail. On the contrary, sect. 15 is most general in its terms, for it enables "every actual tenant in tail" to bar the estate tail; and it would seem that the consent of the husband is not necessary to such a disposition by the wife, for in the analogous case of the wife being entitled to her separate use for life with remainder over in tail, the husband is not protector of the settlement within sects. 22, 24, and 34, so as to render his consent necessary to an absolute disposition by the tenant in tail, since she alone is the protector and the proper person to consent: *Keer v. Brown* (⁹). The disposition of lands by a married woman who is not entitled for her separate use is regulated by sects. 40 and 77.

(¹) Law Rep., 8 Eq., 267.

(²) Law Rep., 8 Eq., 139.

(³) Law Rep., 8 Eq., 142.

(⁴) 5th ed., p. 524; 6th ed., p. 607.

(⁵) 1 Atk., 607.

(⁶) 3 Atk., 695, 715, 716.

(⁷) 29 a, note 6.

(⁸) 2 P. Wms., 816

(⁹) Joh., 138.

Ince, Q.C., and *Colt*, for the respondents, Cooper's assignees, contended that upon the true construction of the will the separate use attached to Mrs. Cooper's life estate only; that she was restrained from anticipation; that her husband 292] having become *bankrupt had no power to concur with her in barring her estate tail and so defeating his assignees; and, consequently, that on her death he became entitled to an interest in her estate tail as tenant by the curtesy.

[They cited *In re Ellis* ('); *Baggett v. Meux*('); *Troutbeck v. Boughey*('); *Robinson v. Wheelwright*('); *Bac. Abr.* "Curtesy of England."]

Bagshawe, Q.C., and *Maidlow*, for the trustees of the will.

JESSEL, M.R.: This case is one of some singularity, and, as far as I know, is not exactly covered by authority. I will, therefore, say something on what I consider the principle of law to be decided, and I will then, as is my habit, comment upon the authorities in order to see whether there is anything to prevent my deciding the case according to principle.

Now the gift in the will must first be construed; the first question I have to decide being whether the separate use attaches to the tenancy in tail, or whether it is limited to the income to accrue during the life of the daughter. [His Lordship then read and commented on the clauses of the will, as above stated, and came to the conclusion that the separate use attached to the tenancy in tail as well as to the income. His Lordship then continued:]

That being so, what is the effect of the separate use standing alone? I say it gives the wife the power of disposition as if she were a single woman. Now that is important. I have already had to consider the question more than once, and I have said that separate use has a meaning as attached to capital as well as attached to income. As regards capital, it does more than secure the income to the wife; it secures her a power of alienation; it is in fact the only meaning to be attributed as regards the capital itself as distinguished from the income. If you said, "I give the income to her separate use, and I give the capital also to her separate use," the second phrase would have no meaning 293] in addition to that *which had previously occurred except to give her a power of alienation.

In other words, a gift of a fee simple estate or a gift of a capital sum of money to the separate use of a married

(¹) *Law Rep.*, 17 Eq., 409; 9 *Eng. R.*, 611.

(²) *Law Rep.*, 2 Eq., 534.

(³) 1 *Coll.*, 138; 1 *Ph.*, 627.

(⁴) 6 *D. M. & G.*, 535.

woman gives her the same power of alienation over it as if she were a single woman. She is entitled to dispose of it as if she were not a married woman at all, and that at once gets rid of any notion of the husband having an interest. Whatever interest he would have had in the absence of disposition is got rid of by the disposition.

The separate use is a creature of equity, and equity says the estate may be so limited to the married woman as that she can get rid of every possible interest of the husband. That is the meaning of a limitation to her separate use and free from his interference or control. It is exactly the same for this purpose as if the estate had been limited to such uses as the married woman shall by deed or will appoint; it entirely destroys the notion of the husband having any interest in it as against her disposition.

Now, on that point it is only necessary to read one sentence from Lord Westbury's judgment in *Taylor v. Meads* (*). He says (*): "The estate given to Elizabeth Meads," who was the married woman in the case, "is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman." As regards the words "husband shall have no interest in the estate so devised," he means as against the wife.

That being so, it seems to me that the married woman in the present case had a power of disposition. Now, what power of disposition? She could not dispose of the estate tail by deed as against herself, because at all events she was restrained from alienation as regards the income; but there is in this will a further clause that she is not to do anything as against the income which would deprive her of the benefit of it; so I am quite clear that, as far as the income is concerned, she could not dispose of the estate at all. There is not, in words, any such restriction on the disposal *of [294 what I call a reversion, although it is not so, because it is one estate. The income during her life is not disposable, but the capital after her death seems to be disposable on this will.

Now, I will assume for the present that the argument of the respondents' counsel is right, that the fetter is on the whole estate. What is the meaning of the fetter? The meaning is exactly that which was expressed by the old

(*) 4 D. J. & S., 597.

23 ENG. REP.

(*) 4 D. J. & S., 607.

common form of conveyancers, "so as in nowise to deprive herself of the benefit thereof by way of anticipation." The meaning was to give the actual enjoyment to the married woman for her own benefit, not for the benefit of anybody else; and it is absurd, it appears to me, to extend such an equitable provision as this so as to prevent a married woman enlarging the estate tail into an estate in fee simple for her own benefit. That is not an alienation so as to deprive herself of anything; it is not, strictly speaking, perhaps, an alienation at all, except in a very wide sense of the term. It is, strictly speaking, what is always called an enlargement of the estate. The mode in which it is done is by a conveyance which is called an alienation, but it is really nothing more than making that estate already given to the married woman indefeasible. If that is so—and all the clauses or fetters on alienation, if applying to the estate tail, would equally apply to the pure fee simple—why should I construe that clause against anticipation, which was invented by a Lord Chancellor for the benefit of a married woman, to her damage and injury?

It appears to me that would be a wrong construction, and altogether opposed to principle. That would amount to saying that that clause which was intended to give her the full benefit of the property is to deprive her of the right of extending that benefit in her own favor, and I entirely decline so to construe the clause against my own views had it been even more extensive than it appears to me to be in this will.

Now, let us look at the enabling clause of the Fines and Recoveries Act. The enabling clause, sect. 15, provides that: "Every actual tenant in tail . . . shall have full power to dispose of for an estate in fee simple absolute . . . the lands entailed," as against in fact all persons whose estates are to take effect either under the estate tail, or after the determination or in defeasance of the estate tail. That is all. It is a power of disposition against those persons to destroy their interest to that extent, and to increase the interests of the married woman. As I said before, there is nothing in the act of Parliament and nothing in the equitable rule, as I understand it, which prevents her effecting such a disposition. Then the 40th section says this, and a good deal of argument has turned upon it: "If the tenant in tail making the disposition be a married woman, the concurrence of her husband shall be necessary to give effect to the same."

In this case the husband did concur. Now it appears to

me the husband's concurrence was requisite, because the separate use could not enable a married woman to turn an estate tail into an estate in fee, whatever else it does. The only way of turning an estate tail into an estate in fee is by virtue of the provisions of the act, and the act does require the concurrence of the husband. But there was the concurrence of the husband, which made the title under the act perfectly good, and she then could devise the estate in fee.

But then this argument was used: it was said that the husband had in the meantime become bankrupt, and was entitled to an estate by the curtesy, and he could not concur after his bankruptcy. Now I will first of all consider whether he had an estate by the curtesy or not, because that has been very much argued. It appears to me that he had and he had not, that is to say, as I understand the law, if the married woman had never appointed or alienated the estate, but had died being tenant in tail in equity or tenant in fee in equity, the husband would have had an estate by the curtesy, whether the estate of the married woman was merely equitable without the separate use, or whether it was equitable together with the separate use; and my reason for saying so on principle is this, that with one notable exception familiar to conveyancers, that of dower, in the incidents of estates equity follows the law, and that would therefore give to the husband the same estate by the curtesy in his wife's equitable estate as he would have in her legal estate. There was no reason to the contrary. When the wife died intestate—for that is the assumption—her husband would take something and her eldest son would take something, and they would be both equitably entitled. As I said before *there was no reason why that disposition should [296 be altered in any degree. The wife's property would descend to her eldest son, subject to the husband's estate; there equity followed the law; but then came the separate use of the wife, which engrafted something on the equitable estate; it took away from the husband the right to receive the income during the coverture, or, as it was called, the equitable estate during the coverture; it gave the wife the absolute ownership during the coverture, and if the separate use attached also to the capital, it gave her the right of disposing of it either by deed or will irrespective of the husband.

It therefore appears to me that to carry that out, the right to the separate use entitled her to dispose of it as much against the husband's estate by the curtesy as against the son's estate as heir. It enabled her to make a pure and clear

disposition of it, and in that way it was wholly independent of the husband. But that is no reason for carrying it a step beyond. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate? Why should it say, I prefer the eldest son to the husband, who had a right at law of succeeding during his life, so to speak, to the estate which had become vacant by the death of the wife? I can see no reason on principle; and therefore it appears to me, if you decide on principle only, you will come to this conclusion, that where a wife, either by deed *inter vivos* or by will, disposes of the fee simple settled to her separate use, that disposition takes effect free from any claim of the husband or the eldest son or other heir-at-law; but that where she dies without making any such disposition, the rights of the husband and rights of the heir are equally unaffected, and equity ought to follow the law.

Is there any authority for, or is there any against, that construction? Now, I must say that the authorities which have been cited in more than one instance are not as satisfactory as they might be. They seem to me to be, to some extent, conflicting; but I think the principle I have laid down will fairly reconcile them. There are two well-known 297] decisions of Lord Hardwicke *which, I think, the ingenuity of man cannot well reconcile. The earlier one, *Roberts v. Dixwell* (¹), appears to me to be quite different to the later one of *Hearle v. Greenbank* (²). Of course, if there had been no other decision and no other view taken of the law, I should have been bound to follow the later one, because, being decisions of the same judge, the later one prevails. The law, however, has been considered settled a great many years ago, and of the two conflicting decisions the earlier one has been adopted. I find a decision of Sir John Leach as long ago as 1821, where he considers the law to be settled; and it would be very difficult now, if nothing else had occurred, to say in the year 1877 that it was not settled. That is the case of *Morgan v. Morgan* (³). I find that followed by a decision of the late Vice-Chancellor of England, Sir Lancelot Shadwell, in the case of *Follett v. Tyrer* (⁴), in which he also treats the law as settled; that is, that notwithstanding the separate use and in the absence of

(¹) 1 Atk., 607.

(²) 3 Atk., 695, 715, 716.

(³) 5 Madd., 408.

(⁴) 14 Sim., 125.

disposition, the husband has an estate in curtesy which, as I have said before, appears to me to be consonant with principle.

And I find that after those two decisions, and for many years the text-books—and I have one before me, Lewin on Trusts—treat the law as settled; and they treat the law as settled down to 1866, for in the 5th edition of his book Mr. Lewin says ('): "It was formerly doubted whether in this case curtesy was not excluded. Lord Hardwicke was originally in favor of the curtesy, but in a subsequent case (without any allusion, however, to his former opinion) he decided against the claim of the husband. It has since been determined that the husband is entitled." When you find law of that kind getting into the text-books as settled law, and with two such decisions as I have mentioned, it ought to be settled. However, unluckily, an attempt was made in 1866 to unsettle it, for the very point came before the Vice-Chancellor Stuart in *Moore v. Webster* ("), and, very much to my surprise, I find him stating that there is neither principle nor authority for that proposition; but how he could say there was no authority when *Morgan v. Morgan* and *Follett v. Tyrer* were cited, I do not *understand. [298] However, having persuaded himself there was neither principle nor authority to prevent his so doing, he decided the other way.

In the year 1869 the same point came before Vice-Chancellor Malins in *Appleton v. Rowley* ("), where, after reviewing the authorities, he considers the law settled, declines to follow Vice-Chancellor Stuart, and says, "I am unable to concur in that decision, for there the whole equitable fee was given to the wife;" and he lays down the rule that wherever the wife is in equity entitled to an estate of inheritance there the husband takes as tenant by the curtesy. As I said before, in the absence of a disposal by the wife he takes an estate by curtesy. That being so, I think Mr. Lewin was justified in his sixth and last edition in repeating his text as he had it before, as being settled law, referring in his note to the two most recent decisions on the subject. I must, therefore, decline to consider the point as fairly open for discussion. So much for the authorities.

Now, that being so, this point was pressed upon me. It was said the husband had been a bankrupt, and the wife, treating her as a single woman, could not by will dispose of an estate tail; she only disposed of it by having enlarged her estate tail into a fee simple, so as to enable her to dis-

(') Page 524.

(") Law Rep., 8 Eq., 267.

(*) Law Rep., 8 Eq., 189.

pose of it by will, it being assumed for this purpose, although I do not agree with it, that she could not dispose of it by deed subject to reserving to herself the income. But the answer is a very plain one. The statute says she may do it, but she shall not do it without the concurrence of the husband. The husband has concurred. There is no limit placed by statute on the concurrence of the husband. There is no bargain on the part of the husband that he will not concur with the wife when he becomes bankrupt. Whether or not he could have made such a bargain under the provisions of the statute for the abolition of fines and recoveries, I do not say. But there is no such bargain. An assignee simply takes what he can get. There is nothing in the Bankruptcy Act to prevent the husband concurring when his concurrence is necessary; and therefore it does not appear to me that the bankruptcy of the husband interfered with his concurrence, and I should be making a new statutory *provision if I said he could not give his concurrence after the bankruptcy.

Even, therefore, assuming, which, as I said before, I do not think is the true assumption, that the fetter on alienation extended to that portion of the estate which remained after the decease of the wife, I do not think there was anything in the fact of the bankruptcy which prevented the husband concurring in this alienation, or which in any way affected it.

The result, therefore, is, that I am of opinion the estate was well devised by the wife, and that the children take.

From this decision the respondents, the assignees, appealed. The appeal was heard on the 1st and 3d of December, 1877.

Ince, Q.C., and *Colt*, for the appellants: The first question is whether a husband is entitled to curtesy out of real estate belonging to his wife for her separate use, and on this the Master of the Rolls was in our favor: *Roberts v. Dixwell* ⁽¹⁾; *Morgan v. Morgan* ⁽²⁾; *Follett v. Tyrer* ⁽³⁾; *Appleton v. Rowley* ⁽⁴⁾, notwithstanding *Moore v. Webster* ⁽⁵⁾. Then, if so, was the disentailing deed effectual? Under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 40, an entail is barred by one of the assurances, which, if the tenant in tail were tenant in fee simple, would pass the estate. Now if this tenant in tail had been tenant in fee she could not

⁽¹⁾ 1 Atk., 607.

⁽²⁾ 5 Madd., 408.

⁽³⁾ 14 Sim., 125.

⁽⁴⁾ Law Rep., 8 Eq., 139.

⁽⁵⁾ Law Rep., 3 Eq., 267.

have passed the estate, for she was restrained from alienation: *Robinson v. Wheelwright* (¹); *Baggett v. Meux* (²); *Taylor v. Meads* (³); *Clive v. Carew* (⁴); *In re Ellis' Trusts* (⁵); *Jackson v. Hobhouse* (⁶). The life interest is an integral part of the estate tail, and cannot be treated as disconnected from it. In the Irish Fines and Recoveries Act (4 & 5 Will. 4, c. 92), s. 69, there is a proviso that a restraint upon anticipation shall override the power of disposition given by the act. A deed by which the married woman limits the fee to *herself to her separate use is a man- 300
ifest overruling of the restraint on anticipation.

[JAMES, L.J., referred to *Dawkins v. Lord Penrhyn* (⁷).]

But suppose the disentailing deed effectual, as soon as there was an equitable fee in the wife and issue had been born the husband's right of curtesy attached, and the will of the wife could not defeat that inchoate right: *Co. Lit.* (⁸).

Chitty, Q.C., *Davey*, Q.C., and *Speed*, for the respondents, were not called on.

JAMES, L.J.: It appears to me that we cannot dissent from the judgment of the Master of the Rolls in this case.

A married woman had an equitable estate tail given to her for her separate use—which means that she might deal with it as if she were a *feme sole*—and there was no restraint on her alienation of it except as regarded the income of her life estate. It appears to me impossible to contend that this clause restraining her from anticipating the income of her life estate could limit her power to enlarge the estate tail into an estate in fee. The fact of her having the estate tail for her separate use means that it is to be preserved from the interference of the husband. If she had made no disposition of it, the estate by curtesy would have attached for the benefit of the husband. We have nothing to do with that; the only question before us is whether she had obtained an absolute right of devising it by will, and I think she had obtained that right.

BAGGALLAY, L.J.: I am of the same opinion. The will gave Mrs. Cooper an equitable estate tail to her separate use, and there was no restraint or alienation beyond the actual rents during her life. Then the clause at the end of the will is perfectly general; the testator declares that "the interest or benefit which any female might take under his will should be held, received, and enjoyed by her to her sole and sepa-

(¹) 6 D. M. & G., 535.

(²) 1 Coll., 138; 1 Ph., 627.

(³) 4 D. J. & S., 597.

(⁴) 1 J. & H., 199.

(⁵) Law Rep., 17 Eq., 409; 9 Eng. R., 611.

(⁶) 2 Mer., 483.

(⁷) 6 Ch. D., 318; 22 Eng. R., 845.

(⁸) 30 a, 40 a.

1877

Boosey v. Fairlie.

C.A.

301] rate use." This must apply to the whole of *the estate in the married woman. Then a deed was executed barring the estate tail and the subsequent estates under which the married woman obtained a new estate, and acquired an absolute power over the property. By this the inchoate right of the husband to curtesy was lost. I am therefore of opinion that the assignees have no claim on the estate, and the appeal must be dismissed with costs.

THESIGER, L.J., concurred.

Solicitors: *Nichol, Son & Jones; Langley & Gibbon.*

[7 Chancery Division, 301.]

V.C.B., May 18: C.A., Nov. 19, 20; Dec. 14, 1877.

BOOSEY V. FAIRLIE.

[1874 B. 171.]

Copyright—Musical Composition—Registration—Copyright Act (5 & 6 Vict. c. 45)—International Copyright Act (7 Vict. c. 12), s. 6.

On the 10th of March, 1869, an opera composed by O., a French subject, was first represented at a theatre in Paris. On the 28th of March, 1869, a pianoforte arrangement of the music of the opera, made by S. with O.'s consent, was published at a shop in Paris, and about the same time an arrangement by S. for piano and voices was also published. In June, 1869, O. assigned the opera and the copyright and the right of public representation to B., an English subject, and handed over to him the MS. score. Upon this assignment a registration was made under the International Copyright Act (7 Vict. c. 12), s. 6, and a copy of the pianoforte arrangement was deposited at Stationers' Hall. The entry on the register gave the title of the opera, the name of the composer, the name of the proprietor of the copyright (describing him as the proprietor of the copyright in the music and the right of publicly performing such music), the time and place of first publication, "28th March, 1869, Rue —, Paris, France," and also the time and place of first representation, "Théâtre —, Paris, France, 10th March, 1869," but did not mention the name of S., nor did it in any way, except by the entry of the time and place of first publication, refer to the pianoforte arrangement. In August, 1869, four separate instrumental parts of the opera were published, but the rest of the score remained in MS.

In 1874, F. brought out at his theatre in London an opera in English under the same title, and announced as with music by O., a substantial part of the music of which was taken from one of the arrangements by S.

In a suit by B. to restrain F. from infringing his copyright in the opera and sole right of public representation:

Held, by Bacon, V.C., that the registration was defective under the International Copyright Act (7 Vict. c. 12), in not mentioning the name of S. as *the author of the pianoforte arrangement, the thing really registered, and from which alone F. had taken the music, and gave B. no title to sue for an infringement of his alleged right.

Held, on appeal, that what was intended to be registered was the opera by O., and not the book containing the pianoforte arrangement by S.; and that as the proper entries for that purpose were made, the additional entry of a date applicable only to the arrangement by S., and the deposit of the book containing that arrangement, did not invalidate the protection which would otherwise have been obtained of the sole right of performing the opera:

Held, further, that the omission of the plaintiffs to deliver to the officer of the Stationers' Company a copy of the four instrumental parts which were published in August, 1869, did not invalidate the protection obtained by the registration, such publication not being a publication of the opera within the meaning of the statute 7 Vict. c. 12, and the convention with France under that act :

Held, further, that a dramatic representation in which a substantial part of the music of O.'s opera was performed was an infringement of the sole right of publicly performing that music, though the operatic score was obtained by independent labor bestowed on the arrangement of S., which was not protected.

THE bill in this cause, filed on the 29th of May, 1874, and amended on the 13th of February, 1875, by Messrs. Boosey, of Regent Street, music publishers, sought to restrain the defendant Fairlie, at that time manager of St. James's Theatre, from representing and performing at the St. James's Theatre or elsewhere the musical composition known as "Vert-Vert," from announcing the music of his opera as Offenbach's, or otherwise infringing the plaintiffs' rights in respect thereof, and to obtain compensation or damages for such infringement of their rights.

In 1869 Jacques Offenbach composed an opéra bouffe, called "Vert-Vert," which was played for the first time at the Opéra Comique, in Paris, on the 10th of March, 1869. A pianoforte arrangement from the full score was made by a M. Soumis, with Offenbach's consent, and on the 28th of March, 1869, printed and published as "Partition pour piano seul arrangée par L. Soumis," at 10 Rue de la Chaussée d'Antin, in Paris. About the same time another arrangement by Soumis for piano with voices, and with the insertion at the commencement of the overture and in other places of the names of the musical instruments used in the operatic score, was published as "Partition chant et piano arrangée par L. Soumis."

In June, 1869, Offenbach assigned, for valuable consideration, *the said opera and the copyright of and in the [303 same, with the right of publicly playing and performing the music, to the plaintiffs, and handed over to them the full MS. orchestral score. The opera was thereupon, on the 9th of June, 1869, registered at Stationers' Hall, under the provisions of the Copyright Act (5 & 6 Vict. c. 45) and the International Copyright Act (7 Vict. c. 12), and a copy of the printed pianoforte arrangement delivered to the proper officers. The entry of this registration was as follows :

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Time of making the entry.	Title of Book.	Name and place of abode of the Author or Composer.	Name and place of abode of the Proprietor of the Copyright.	Time and place of first publication.
June 9, 1869.	Vert-Vert, Opéra Comique, en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach.	Jacques Offenbach, 11 Rue Lafitte, Paris, France.	Jacques Offenbach, 11 Rue Lafitte, Paris, France, Proprietor of the copyright in the music, and of the right of publicly performing such music.	28th March, 1869, 10 Rue de la Chaussée d'Antin, Paris, France. Time and place of first representa- tion : Théâtre Impérial de l'Opéra Comique, Paris, France. 10 March, 1869.

The title-page of the book deposited at Stationers' Hall was,

“Théâtre Impérial de l'Opéra Comique,
A Mons. Victor Capoul,
Vert-Vert,
Opéra Comique, en 3 Actes.
Paroles de
MM. Meilhac et Nuitter.
Musique
de
J. Offenbach.

Partition pour piano seul arrangée par L. Soumis.

Prix net 10 f.

Paris: E. Heu Editeur, 10 Rue de la Chaussée d'Antin.
Londres: Boosey & Co. Berlin: Bock. Italie, Espagne,
Portugal, Belgique, Suisse, Russie, &c.

Déposé selon les traités internationaux.”

304] *On the same day the plaintiffs, as assignees of the copyright, registered their assignment at Stationers' Hall, which was entered as follows:

Date of Entry.	Title of Book.	Assigner of the Copyright	Assignee of Copyright.
June 9, 1869.	Vert-Vert, Opéra Comique, en trois actes, paroles de MM. H. Meilhac et Nuitter, musique de J. Offenbach. See Foreign Entries, page 115.	Jacques Offenbach, 11 Rue Lafitte, Paris, France, Proprietor of the copyright in the music, and of the right of publicly performing such music.	Charles Boosey and John Boosey, of No. 28 Holles Street, Middlesex, as assignees of the copyright in the music of the said book, and also of the sole right of publicly performing such music.

The plaintiffs' case was, that by virtue of such sale, assignment, and registration, they became the sole proprietors of the opera and music, and of the copyright thereof, and of the right of publicly playing and representing and of publishing the same, and allowing the same to be played, represented, and published.

On the 9th of August, 1869, four of the orchestral parts of the opera, viz., the parts for first and second violins and tenor, and the part for violoncello and contrabasso, were printed and published for sale in Paris. No copy of any of these parts was delivered to the officer of the Stationers' Company. The rest of the score remained in manuscript. The book containing the piano arrangement was not registered at Stationers' Hall, nor was Soumis' arrangement for voices and piano registered.

On the 2d of May, 1874, the defendant, then manager of the St. James's Theatre, brought out an *opera bouffe* called "Vert-Vert," with English words written by Messrs. Herman and Mansel, and with music, a considerable portion of which was taken and arranged by Vandebossche, the defendant's conductor, from one of Soumis' published arrangements of Offenbach's music.

The plaintiffs remonstrated with the defendant, and threatened proceedings for infringement of their copyright unless some arrangement should be at once made respecting payment of their fees for the right of representation.

The defendant asserted in reply that "Vert-Vert" was not a *registered opera within the provisions of the [305 International Copyright Act (7 Vict. c. 12), stating that if M. Offenbach or the plaintiffs had any legal claim for fees he was prepared to pay them.

Further correspondence resulted in a refusal by the defendant to withdraw the piece or the announcement that the music was by Offenbach.

On the 29th of May, 1874, the plaintiffs filed their bill to restrain the defendant from infringing their copyright and to obtain damages, and they shortly afterwards obtained an interlocutory injunction staying the performance of the English version of "Vert-Vert."

It clearly appeared that the music performed by the defendant was not taken from Offenbach's original score. There was some dispute from which of Soumis' two published arrangements Vandebossche made out his score, but the court considered it shown to have been made from the arrangement for piano and voices.

The cause came on for hearing before Vice-Chancellor Bacon on the 18th of May, 1877.

Kay, Q.C., Philbrick, Q.C., and T. A. Roberts, for the plaintiffs: The registration of the 9th of June complies exactly in every particular with the requirements of the International Copyright Act (7 Vict. c. 12), s. 6, as to dramatic pieces and musical compositions in MS., and protects the right to the public representation which was assigned to us by Offenbach, together with the MS. orchestral score. It can hardly be contended, after *Wood v. Boosey* (¹), that the pianoforte arrangement, which was the derivative work, is protected by this entry; but the invalid entry of the pianoforte score is mere surplusage, distinct from the entry of the original score, as is shown by the last column of the register, and in no way invalidates the right of public representation which was assigned to the plaintiffs by Offenbach, and has been duly registered under the provisions of sect. 6; and for the infringement of which by the defendant the plaintiffs now sue.

306] **Romer*, and *Robert Williams*, for the defendant: The case is virtually decided by *Wood v. Boosey* (¹), where the entry was of "Die Lustigen Weiber von Windsor, Komische Oper. Composed by Otto Nicolai, Pianoforte Score;" and it was held that as the arrangement for the pianoforte was an independent musical composition, of which Brissler and not Nicolai (the composer of the opera) was the author, the entry was bad, and gave no title to the plaintiff, who was precluded by his entry from saying that he had not sought to protect the pianoforte score. So in this case, the plaintiffs, by the terms of the entry, are seeking to protect something which was first published on the 28th of

(¹) Law Rep., 3 Q. B., 223.

March, 1869. Now the only thing published on that day was the pianoforte arrangement, of which Soumis, and not Offenbach, was the author; and accordingly, if what they seek to protect is the pianoforte score, to which alone the defendant has had recourse, the case is concluded against them by *Wood v. Boosey*. If, on the other hand, they are seeking to protect the general score and not the pianoforte arrangement, then they are in a worse position, as it is essential, in order to acquire a title by registration under the act, that there should be nothing wrong, nothing false, nothing misleading in the entry, and the strictest compliance in all respects with the provisions of the act is required: *Page v. Wisden* (¹); *Lowe v. Routledge* (²); *Matthieson v. Harrod* (³). This entry is false and misleading. It is not true that the general score, as held out by the entry, was published (as distinguished from first representation, the date of which is given) on the 28th of March, 1869, or at all; and this misstatement is enough to put them out of court. But further, the plaintiffs seek to restrain the defendant from infringing the published arrangements, from which alone, both on our evidence and on theirs, has the defendant taken any part of the music. In respect of those arrangements there is absolutely no copyright in this country; anybody may print, anybody may use them.

Kay, in reply: In *Wood v. Boosey* the description on the register of the thing sought to be protected was of a "piano-forte score." Here the *registration is of the MS. of [307 the comic opera of which Offenbach, and not Soumis, was the composer, and of the right of representing and playing that opera. We admit that the statement of first publication, on the 28th of March, 1869, was inaccurate, as Offenbach's MS. has never been published, and Soumis' name ought to have been given as the author of the arrangement actually published. But how does that affect our sole right of public representation, which was assigned to us by Offenbach, and is what was claimed by the entry? If any one was misled, it was not the defendant, for he states in his evidence that he took the published book and made up his opera from it. *Page v. Wisden* (¹) and the other cases cited, where false statements were held to vitiate the entry, do not apply to an entry like this, where something unnecessary has been wrongly stated.

BACON, V.C.: The case depends wholly on the statute (7 Vict. c. 12), which alone expresses what is the law on this subject. If I had to consider what may be called the merits

(¹) 17 W. R., 483.

(²) 33 L. J. (Ch.), 717.

(³) Law Rep., 7 Eq., 270.

of the case, of course I might very likely take a view wholly different from that which the defendant has urged, but I am not at liberty to do so. The act of Parliament requires, as an essential condition to the acquisition of a copyright in the case of a printed thing, or to secure the exclusive right of representing a musical composition which remains in manuscript, that that should be registered in the way mentioned by the statute. Those are the conditions on which alone a copyright can be acquired.

In this case the thing for which copyright is claimed is called "'Vert-Vert,' Opéra Comique," and so on, "Music by Offenbach." Passing by the next two columns, which only describe the authorship of the book and the property in it, the next thing I find is that the 28th of March, 1869, and the place mentioned, are given as the time and place of the first publication. The first publication of what? Of an opera the words of which are written by the authors there mentioned, and the music of which is written by Offenbach. But that is not all, because at the same time, by a positive act, a book answering that description is deposited with the registrar *at Stationers' Hall, and there is no question that that, and that only, is the thing registered.

But then it is said there is, besides, another thing claimed by this entry, viz., the right of representation, of which Offenbach is said to be sole proprietor, and which first took place on the 10th of March, 1869. But there are no two things claimed by this registration. If Offenbach had claimed in the words of the statute, being the owner of an unpublished manuscript, the sole right of representation, and that had been properly entered, that, no doubt, would have given him the right which the statute confers and no more. He has done no such thing; he has claimed nothing but a printed book, which he exhibits at the time when the entry is made, which he deposits that it may be referred to for all purposes, and then says that the first representation was on the 10th of March, 1869. That is no registration. The book was a book of which Soumis was the author. That is the thing for which copyright is claimed, and there is no other.

It is admitted that the entry is erroneous so far as relates to the book, and therefore there can be no right acquired by the person entering, nor by the assignee of that person, and yet that is the only thing this defendant has used. He has not interfered with any right which Offenbach has. Offenbach may, perhaps, now register the sole right of representation. Whether the time has elapsed during which

that could be done it is not necessary to inquire. But what the defendant has done has been to avail himself of a publication referred to in the registry, but not expressed in such terms as would give any exclusive right. That printed book, and that alone, has he resorted to. [His Lordship here referred to the evidence.] If, then, the entry is erroneous, so that no copyright could be obtained in it, and all that the defendant has done has been to avail himself of that book which has no protection, how can I say he has infringed anybody's rights? It may have been the intention of Offenbach when he made this entry, or when somebody made it for him, to have claimed also the sole right of representation. But then they could not claim that sole right by an entry of music, of which, as the adapter and arranger for the piano-forte, Soumis was the author, when that to which the sole right of representation would refer, and which they were *entitled to register was an unpublished manuscript. [309 I think *Wood v. Boosey* (') covers it (and indeed it is not disputed) as to the first point, that the entry is erroneous. If it is erroneous, no right is acquired by it, and if no right is acquired by it, all the defendant has done has been perfectly justifiable. If there were no statute he would have been at liberty by the exercise of his memory—and some people have been so gifted—to recollect the notes of the airs, and perhaps more than the airs, the choruses and other things, and to have written them in music, and have had them sung and performed at his own instance. Indeed there is a very remarkable instance in the history of the theatre, when Beaumarchais' plays were exciting so much popularity in France. An English dramatist who happened to be in France, with the help of his friend, took down—not in shorthand, for they could not write that, but took down—in their memories the scenes in the "Marriage de Figaro," and went out at the end of each scene or act and transcribed it, so that within a short period after the public representation of that play in Paris, the "Marriage of Figaro" was brought out on the English stage, no line of it having been printed, and no manuscript ever having been furnished to them. I say if there was no statute that might be done by anybody with Offenbach's music. If Offenbach desires to have the benefit this statute, he must comply with the requisitions of the statute. He has registered a publication which is quite different from his own original manuscript, and the entry being totally silent on the subject of his manuscript, the reference being direct to Soumis' print, no copyright was

(') Law Rep., 3 Q. B., 223.

acquired, and therefore there is no ground on which this suit by Messrs. Boosey, who are the assignees of that unpublished manuscript, can possibly be sustained in this court. The bill must be dismissed with costs.

The plaintiffs appealed. The appeal was heard on the 19th and 20th of November.

Kay, Q.C., Philbrick, Q.C., and T. A. Roberts, for the plaintiffs: The thing which the registration was intended to protect was the right of publicly performing the music. 310] If it had been printed *it would have been necessary to deposit a copy of the print, but it never was printed. The entry, by mentioning the date of publication, impliedly states that it was printed, which was erroneous; but this could not mislead any one, and an error of this nature cannot affect a registration otherwise perfect. It is urged that the defendant has only made use of Soumis' published arrangements in which there is no copyright; but if, because a pianoforte arrangement is not copyright, any one may make out a score from it and publicly perform the opera from such score, the protection which the act intended to give to musical compositions will be to a great extent destroyed.

Romer, and Robert Williams, for the defendant: We say, first, that it is necessary not only to have the work registered but to deposit in certain public libraries a copy of the work so far as it is printed: Convention with France, Art. 8, given in Phillips on Copyright ('). The parts which were published in August, 1869, ought therefore to have been deposited.

[JAMES, L.J.: If you allege that a plaintiff has lost his right by conduct subsequent to the accruer of his right, you ought to plead it.]

We could not do so, for it was not within our knowledge till it came out on the plaintiff's evidence. Then we say the entry was misleading. Fairlie searched, and went away with the impression that it was not intended to register anything but Soumis' arrangement. The plaintiffs make an entry pointing at that book, and they deposit a copy of it; this shows the scope of the registration. The first words of the entry might be sufficient to protect the score, but they are controlled by the subsequent parts. The MS. then is not protected. But suppose it is protected, there is, as the plaintiffs admit, no protection for Soumis' arrangement, and that is the only thing the defendant has used. The

(') Page, 250.

statute 7 Vict. c. 12, s. 6, allows fair imitations and adaptations, and this was one. Then an assignment in writing of the copyright is necessary, *Leyland v. Stewart*(¹); and none has been proved.

Kay, in reply.

*Dec. 14. THESIGER, L.J., now delivered the judgment of the Court (James, Baggallay, and Thesiger, L.JJ.):

The plaintiffs in this appeal claim, as assignees from the French composer Offenbach, to be entitled to the sole right of publicly performing the music of an opéra bouffe or comique called "Vert-Vert," and to restrain by injunction the continuance of, and to obtain compensation in damages for, an alleged infringement of that right on the part of the defendant, under the following circumstances: At some time prior to the 10th of March, 1869, Offenbach composed and wrote in France the full score of the opera in question, the libretto for it being furnished by Messrs. Meilhac and Nuitter, and the opera so composed was performed for the first time upon the 10th of March, 1869, at the Théâtre Impérial de l'Opéra Comique, in Paris. On the 28th of March, 1869, there was printed and published for sale in France an arrangement for the piano of the music of the opera, the arranger being a person of the name of Soumis, and the book containing such arrangement having upon its title-page the following title: "Vert-Vert, Opéra Comique, en trois actes. Paroles de MM. Meilhac et Nuitter; musique de J. Offenbach. Partition pour piano seul arrangée par L. Soumis." At some date prior to the 9th of June, 1869, there was also printed and published for sale in France another arrangement by Soumis of the music of the opera for piano with voices, and with the insertion at the commencement of the overture and in other places of the names of certain musical instruments, which, if the pianoforte arrangement were to be converted into a full operatic score, would afford some indication of the instruments to be used. The title of the latter arrangement was the same as that of the former, with the exception that in lieu of the words "partition pour piano seul" were used the words "partition chant et piano." On the 9th of June, 1869, in alleged pursuance of the provisions of 7 Vict. c. 12, and with the view of obtaining the benefit of that act and of the convention founded upon it made between this country and France on the 3d of November, 1851, an entry, a copy of which is to be found at page 3 of the plaintiffs' bill of complaint was made in the book

(¹) 4 Ch. D., 419; 20 Eng. R., 652.

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of registry kept at Stationers' Hall under the act, and on the same day a subsequent entry of assignment to the plain-
312] tiffs was *made, a copy of which is to be found at page 4 of the bill. The first entry gave the "title of book" as "Vert-Vert, Opéra Comique, en trois actes. Paroles de MM. H. Meilhac et Nuitter; musique de J. Offenbach," the "name of author or composer" as "J. Offenbach," adding his place of abode; the name of the proprietor of the copyright as "J. Offenbach," adding his place of abode, and that he was the "proprietor of the copyright in the music and of the right of publicly performing such music;" the "time of first publication" as the 28th of March, 1869, adding the place; and the "time and place of first representation" as the "Opéra Comique, Paris, on the 10th of March, 1869." Contemporaneously with these entries there was delivered to the office of the Company of Stationers a book containing the first-mentioned arrangement for the piano by Soumis. On the 9th of August, 1869, four of the orchestral parts of the opera as composed by Offenbach—viz., the parts for first and second violins and tenor, and the part for violoncello and contrabasso—were printed and published for sale in Paris, and, with that exception, the full score of the opera, containing the whole of the parts for the voices and for the various instruments of the orchestra, remained at the time of the filing of the bill in manuscript. About the month of April, 1874, the defendant, who was then the manager of the St. James's Theatre, in London, having determined to produce an opéra bouffe at that theatre, applied to a Mr. Richard Mansell for his aid in the matter, and being informed by him that an opéra comique, founded upon an old French novel entitled "Vert-Vert," had been composed by Offenbach, and that there was no existing copyright in the opera, employed Mansell and a Mr. Herman to write for him the libretto for an opéra bouffe founded upon the said French novel. The libretto was accordingly written by Mansell and Herman, who also, with the assistance of the musical director employed by the defendant, arranged the music for the libretto, and such music, as stated by the defendant in his affidavit, consisted of portions of the said opéra comique by Offenbach, together with portions of other operas by other composers. The evidence, in fact, establishes that a substantial and material part of Offenbach's music was taken, and that for that purpose Soumis' arrangement for piano with voices was made use of.

313] *Advertisements were then inserted by the defendant in various London newspapers, announcing that an

opéra bouffe, entitled "Vert-Vert," written by Messrs. Herman and Mansell, music by Offenbach, would be produced at the St. James's Theatre on the 2d of May, 1874, and on that day and for some time subsequently the opera, as advertised, was performed.

In this state of facts the plaintiffs filed their bill of complaint, which, as amended, was dismissed by the learned Vice-Chancellor, mainly on the ground that what had been registered was not Offenbach's manuscript score, but the arrangement by Soumis of the music of the opera for piano-forte alone, and that the registration was invalid, according to the authority of *Wood v. Boosey* (¹), in consequence of the name of Offenbach, and not that of Soumis, being entered as the composer and proprietor of that arrangement.

The argument for the defendant upon this point rests upon the fact that in the last column of the book of registry, under the heading "Time and place of first publication," the date of the 28th of March, 1869, is entered, being the date of the publication of the arrangement by Soumis, a copy of which was deposited contemporaneously with the entry; and it is contended that either the thing registered was the arrangement by Soumis, in which case the registration was invalid according to *Wood v. Boosey*, or at least the entries were so misleading that the registration ought to be held invalid. The plaintiffs, on the other hand, while admitting that the arrangement by Soumis is not protected, point to the heading, also in the last column of the register, entitled "Time and place of first representation," under which is entered the date of the 10th of March, 1869, being the date of the first representation of Offenbach's manuscript opera, and contend that the entries in all the preceding columns are applicable to that opera, rather than to Soumis' arrangement, and form a complete set of entries sufficient to protect and clear enough to inform everybody reading them that they were intended to protect the right of representing the opera in this country, and further contend that the protection attributable to entries so complete and clear ought not to be invalidated by reason of the making of an additional entry, which, upon their hypothesis, was an unnecessary act.

*We are of opinion that the contention of the [314 plaintiffs ought to prevail. The provisions in regard to registration of a foreign dramatic piece or musical composition are contained in 7 Vict. c. 12, s. 6, and require that, in the event of such piece or composition being printed, the title

(¹) Law Rep., 3 Q. B., 228.

to the copy, the name and place of abode of the author or composer, the name and place of abode of the proprietor of the copyright, and the time and place of the first publication, representation, or performance, as the case may be, in the foreign country shall be entered in the register, and that one printed copy of such piece or composition shall be delivered to the officer of the Company of Stationers. If the dramatic piece or musical composition be in manuscript, all that is required is that the title, the name, and place of abode of the author or composer, the name and place of abode of the proprietor of the right of performing or representing, and the time and place of the first representation or performance in the foreign country shall be entered in the register. The task of making and also of construing the statutable entries in this and similar cases is rendered somewhat difficult owing to the circumstances—first, that the statute does not require or the book of registry in form provide for any description of the thing intended to be registered apart from its title, although the subject-matter of registration under sect. 6 of 7 Vict. c. 12, includes books, prints, articles of sculpture, and other works of art, as well as dramatic pieces and musical compositions; and, secondly, that the register in its actual form is framed with headings applicable only to the registration of a book or other printed matter; and, while we are bound, without any reference to hardship or other extraneous considerations, to see that the provisions of the Registration Act, however technical and minute they may be, are literally complied with, we ought at the same time to be careful that we do not ourselves create difficulties or impose obligations beyond those which by express enactment persons registering have respectively to meet and sustain. Taking then the entries in the present case, as given at page 3 of the bill, and confining our attention first to the second, third, and fourth columns, it seems to us clear that what is intended to be registered is the opera of Offenbach, and not the book containing the piano-
315] forte arrangement of Soumis. In the *second column, headed "Title of book," instead of finding, as was the case in *Wood v. Boosey*(¹), the words "pianoforte score," or any words pointing to Soumis' arrangement for the piano, we find the words "Vert-Vert, opéra comique," followed (after reference to the libretto) by the words "Musique de J. Offenbach." In the third column we find the name of Offenbach entered as that of the composer, and in the fourth column the same name as that of the proprietor of the copy-

(¹) Law Rep., 3 Q. B. 223.

right in the music (i.e., the music of J. Offenbach in the second column mentioned), and of the right of publicly performing such music. We then come to the last column, where we find, under the heading "Time and place of first representation," the entry "Théâtre Impérial de l'Opéra Comique, Paris, France, March 10, 1869," being an entry solely relating to the opera composed by Offenbach, and having no connection whatever with the pianoforte score by Soumis. The entries, therefore, to this point are not only both consistent with the fact of the thing registered being the opera of Offenbach, as composed and written by him, and also complete for the purpose of protecting the sole right of performing it, but appear to us utterly inconsistent with the notion that Soumis' arrangement for the piano was the thing to be registered; and, that being so, it seems to us unreasonable to attribute to the entry in the last column of the date 28th of March, even when coupled with the deposit of the book containing Soumis' arrangement for the piano, such force as to override the entry relating to the opera in the same column which, as containing the earlier date, is, *prima facie*, the more important one, and to convert the whole of the preceding entries, which *per se* are in their terms applicable to the opera, into an attempted, and, as it is now admitted, invalid, registration simply of the pianoforte arrangement.

We are of opinion, therefore, that the music of Offenbach's opera, and not the pianoforte arrangement, is the thing primarily intended to be registered, and we come to the question whether the additional entry referring to Soumis' arrangement, and the deposit of the book containing that arrangement, ought to be held to invalidate the protection which would otherwise have been obtained of the sole right of performing the opera. In making the entry *and [316 depositing the book, the person concerned in the registration may have been actuated either by a notion that the terms of the statute or the convention possibly necessitated a reference to the publication and the deposit of the pianoforte score, or by a desire to acquire a copyright in that score, as well as the right of performing Offenbach's manuscript opera. But, whatever was the reason prompting the acts, we have had cited to us no authority, and we can find nothing in the statute under which the registration is made, which would bind or even entitle us to say that those acts have rendered invalid a registration of the opera in all other respects complete.

The tendency, probable or possible, of the superfluous

entry and unnecessary deposit to mislead, is a topic which of course may be and has been properly urged upon us in argument, but such topic has, in our opinion, too much that is speculative and uncertain in it to be allowed to outweigh the argument founded upon the compliance, so far as the right of dramatic representation is concerned, with the provisions of the Registration Act.

Assuming the original registration of proprietorship to be valid, it has been urged on behalf of the defendant—first, that under the convention of 1851 the protection given by the registration became subsequently inoperative, in consequence of the plaintiffs not having delivered to the officer of the Stationers' Company a copy of the four instrumental parts published on the 9th of August, 1869; secondly, that the plaintiffs have given no sufficient proof of the assignment by Offenbach to them; and, thirdly, that the performance of an opera, the music of which, although in great part that of Offenbach's opera, had been taken from the unprotected arrangement of Soumis, did not constitute an infringement of the plaintiffs' rights. Upon all these points we are of opinion that the defendant has failed to make out a good defence to the bill. Upon the first point it is unnecessary to decide whether, supposing a dramatic piece or musical composition in manuscript to have been registered so as to give protection to the right of representing it or performing it, the subsequent printing and publication of such piece or composition, if not followed by the deposit of a copy at Stationers' Hall, can be held to take away that right, for in [317] the present case it appears to us that the *publication of the four instrumental parts does not constitute a publication of Offenbach's opera within the meaning either of the convention or of the statute under which that convention was made. Upon the second point it appears that a copy of the registered entry of the assignment, certified under the hand of the officer of the Stationers' Company, and impressed with the stamp of the company, has been put in evidence. Such copy constitutes *prima facie* evidence of the assignment, although subject to be rebutted by other evidence (see sects. 11 and 13 of 5 & 6 Vict. c. 45, and sect. 8 of 7 Vict. c. 12), and, inasmuch as in this case no rebutting evidence has been given, the proof of the assignment is complete.

Upon the third point, viz., that of infringement, we are of opinion that a dramatic representation in which a substantial and material part of the music of Offenbach's opera has been performed constitutes an infringement of the sole

right of performing that music, even though the operatic score may have been obtained by independent labor bestowed upon the unprotected pianoforte arrangement of Soumis. There is scarcely any popular opera the score of which is not, within a short time after its first performance, arranged for the piano, and if by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory. During the argument no authority was cited to us upon this point, but the cases of *Reade v. Lacy* (') and *Reade v. Conquest* (') seem to have decided the very point in conformity with the view we have expressed. There Mr. Reade, the author, had written and obtained copyright in a drama called *Gold*, and had subsequently written a novel called *Never too late to Mend*, founded on and incorporating a considerable part of the dialogue of the drama, in which novel he had also obtained copyright. The novel was dramatised by the application of independent labor, and without any knowledge of Mr. Reade's own drama, and, so dramatised, was represented on the stage; and although, as appears from the report in the Common Pleas, these actions were held in that *court not to be an infringement of [318 the copyright in the novel, and, for the purposes of argument, the Vice-Chancellor, in *Reade v. Lacy* ('), assumed them not to be an infringement of it, yet they were in both courts held to be an infringement of Mr. Reade's sole right of representing his drama. The appeal must therefore be allowed, and an injunction granted in the terms of the prayer of the bill.

Solicitors: *R. G. Marsden; E. Johnson.*

(') 1 J. & H., 524.

(?) 11 C. B. (N.S.), 479.

[7 Chancery Division, 318.]

V.C.B., Nov. 15: C.A., Dec. 21, 1877.

PILCHER V. ARDEN.

In re Brook.

[1871 P. 54.]

Solicitor—Lien for Costs—Charging Order—23 & 24 Vict. c. 127, s. 28.

By an order made in an administration suit, the costs were ordered to be taxed, and the plaintiff's costs to be paid to his solicitor, B., out of a specified fund in court. Before the costs had been taxed the plaintiff obtained an order to change his solicitor, and B. no longer acted for any party in the suit:

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Held, that B. was entitled to a charging order, under 23 & 24 Vict. c. 127, upon the interest of his client in the funds in court, notwithstanding the prior order for payment out of a certain specified fund; but that such order ought not to extend to directing a sale, but must be limited to giving the parties liberty to apply. The fact that the plaintiff had in the meantime assigned his interest with the knowledge of B. made no difference.

The order of Bacon, V.C., varied.

Held, also, by Bacon, V.C., that B. had a right to retain the papers in the suit till his costs were paid.

THIS suit was commenced in 1871 for the administration of the estate of Jeremiah Pilcher, and a decree directing inquiries was made, and certain funds ordered to be brought into court. The plaintiff, Arthur Pilcher, was entitled to a life interest in a portion of the estate. Mr. Brook acted as his solicitor in the cause.

On the 23d of July, 1875, by the order on further consideration, it was ordered, among other things, that the costs of all parties should be taxed, and that the costs of the plaintiff should be paid out of certain of the funds in court 319] therein mentioned to *Mr. Brook; and further consideration was reserved, with liberty to all parties to apply.

By a further order on the 7th of May, 1877, after stating that the costs of the suit had not then been taxed, it was ordered that the subsequent costs of all parties should be taxed and paid out of the funds mentioned in the former order, and if they were not sufficient, then out of certain other funds therein mentioned, and any of the parties were to be at liberty to apply in chambers as to raising and paying the residue of such costs as they might be advised.

On the 11th of July, 1876, the plaintiff assigned his life interest in certain property, including the funds in court in the suit, to the Law Reversionary Interest Society.

On the 17th of July, 1877, the plaintiff obtained an order to change his solicitor, and Mr. Brook no longer acted for any party in the cause. He now applied by summons in chambers for an order under 23 & 24 Vict. c. 127, s. 28, charging the plaintiff's life interest in the funds in court with his costs. The Law Reversionary Interest Society filed an affidavit, in which they stated that Mr. Brook had notice of the assignment of the plaintiff's interest while it was being negotiated, and made no objection to it.

Another summons was taken out by the plaintiff to compel Mr. Brook to give up the papers in the suit. The two summonses were adjourned into court and came on to be heard together before Vice-Chancellor Bacon on the 15th of November, 1877.

Sir H. Jackson, Q.C., and *Byrne*, for Mr. Brook, on the first summons asked for an order in the form given in *Twoy*-

nam v. Porter ('). They cited *Haynes v. Cooper* ('); *In re Fiddley* ('). On the second summons they referred to *In re Faithfull* ('); *Robins v. Goldingham* (').

Langworthy, for the Law Reversionary Interest Society, in opposition to the first summons, referred to *Ex parte Thompson* ('); *Hicks v. Keate* (').

**Buckley*, for the plaintiff, also in opposition to the [320 first summons, referred to *De Bay v. Griffin* (') and *Hobson v. Shearwood* ('). In support of the second summons he relied on the special circumstances of the case, Mr. Brook having delivered no bill and taken no steps to have his costs taxed although two years and a half had elapsed since the order was made.

Sir H. Jackson, in reply.

BACON, V.C.: With respect to the second summons, I think it is bound by authority. I cannot see that it makes any difference that no bill has been delivered. A client can at any time have a bill whenever he likes to apply for it. There is no ground on which this summons can be supported, the solicitor having been discharged by his client.

As to the other summons, I am of opinion that the case comes clearly within the 28th section of 23 & 24 Vict. c. 127. No doubt there was an order for taxation of costs, and for payment of the costs out of a fund which was sufficient for this payment. But the statute has given to the solicitor a right to call for a charge whenever he thinks fit for the taxed costs, charges, and expenses of or in reference to the suit, matter, or proceeding. Nothing can be said against such an enactment as this, but by a purchaser for valuable consideration without notice. In this instance the Reversionary Society had full notice. Therefore the circumstance of this purchase having been made does not impeach the right of the solicitor to have his charge. Although I am not bound, it is true, by the decision in *Twynam v. Porter* ('), which has been cited to me, I am very willing to be guided by it. This is not a question of propriety, it is a question of whether the inherent right of the solicitor to have a charge for his costs is to prevail over that of a purchaser.

The order must be similar to that which was made in *Twynam v. Porter*, directing that the amount of the costs

(') Law Rep., 11 Eq., 188.

(') 23 Beav., 431.

(') Law Rep., 7 Ch., 773; 3 Eng. R., 622.

(') Law Rep., 6 Eq., 325.

(') Law Rep., 18 Eq., 440.

(') 3 L. T. (N.S.), 317.

(') 3 Jur., 1024.

(') Law Rep., 10 Ch., 291; 12 Eng. R., 731.

(') 8 Beav., 486.

321] when taxed shall *be raised by a sale, with the approbation of the judge, of the plaintiff's interest.

From this decision the Law Reversionary Interest Society appealed. The appeal was heard on the 21st of December.

Bristowe, Q.C., and *Langworthy*, for the appellants: It was decided in *In re Viney's Trust*⁽¹⁾ that where costs in a suit have been ordered to be paid to a solicitor personally out of a fund in court, he cannot afterwards obtain a charging order under the act on his client's interest. In the present case there would be a great hardship if it were permitted, because the solicitor might proceed under the terms of the order appealed from to sell the life interest of the plaintiff, although under the order on further consideration the capital of a special fund was appointed for the purpose. The solicitor ought to bring in his bill to be taxed, and proceed under that order. We also contend that Mr. Brook is barred by his acquiescence in the assignment at the time when it was made.

Sir H. Jackson, Q.C., and *Byrne*, for Mr. Brook: The distinction between this case and *In re Viney's Trust* is that in that case the solicitor was still the solicitor in the cause, but Mr. Brook has been discharged, and therefore he cannot enforce the order on further consideration. He was no longer engaged for any of the parties, and as the liberty to apply is only reserved to the parties, Mr. Brook cannot take out a warrant before the Taxing Master. His only course is to take independent proceedings against his former client: *In re Fidley*⁽²⁾; *Twynam v. Porter*⁽³⁾.

Bristowe, in reply.

JAMES, L.J.: I have ascertained by inquiry from the Taxing Master that in a case like the present the solicitor, 322] not being engaged for any party *to the cause, would have no right to take out a warrant to enforce the order for taxation. It is therefore reasonable that he should be allowed to obtain an order under the statute. But the order must be varied by striking out the direction that the amount should be raised by sale with the approbation of the judge, and inserting in its place a direction that either party may be at liberty to apply to the judge with reference to enforcing the charge by sale or otherwise. There will be no costs of the appeal.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Capron & Co.*; *W. B. Brook*.

⁽¹⁾ 18 L. T. (N.S.), 853.

⁽²⁾ Law Rep., 7 Ch., 773; 3 Eng. R., 622.

⁽³⁾ Law Rep., 11 Eq., 181.

See 22 Eng. Rep., 671 note.

[7 Chancery Division, 322.]

V.C.B., May 29: C.A., Dec. 8, 1877.

MORTIMER V. SLATER.

[1876 M. 336.]

Will—Next of Kin according to the Statute of Distributions—Time of ascertaining Class.

A testator gave one fourth of a fund to one of his four daughters by name for life, and after her death to her children then living, but if she left no child, then he directed that the interest should be paid to his other daughters then living and the survivors and survivor of them, and after the decease of the last survivor he directed the same fourth share to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statutes for the Distribution of Intestates' Estates." He declared similar trusts of the other fourth shares respectively in favor of his other three daughters respectively and their respective children, with the same ultimate limitations. One daughter died after the testator, leaving children; the other three afterwards died without issue:

Held, by Bacon, V.C., that the class of next of kin was to be ascertained at the death of the last surviving daughter.

Held, on appeal, that the class was to be ascertained at the death of the testator; and that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters.

JOHN CLARKE, by will dated in 1825, bequeathed to trustees £12,000 consols upon trust as to £3,000 consols, part thereof, to pay the income to his daughter Sarah G. Clarke during her life, for her sole and separate use without power of anticipation, *and after her death, if she should [323 have married and leave issue, upon trust to divide such £3,000 consols among her children living at her decease, and if she should have but one child, then to such only child, with powers of maintenance. The will then proceeded:—

"And in case my said daughter Sarah G. Clarke shall die without leaving issue her surviving, then I will and direct that the interest and dividends of the said sum of £3,000 consols be paid and divided to and among such of my said other daughters as shall then be living and to the survivor and survivors whether single or married, but to and for their sole and separate use and benefit. And from and immediately after the decease of my last surviving daughter, that the said sum of £3,000 consols be paid and divided to and among the child or children, if any, of such last surviving daughter; or, if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates."

There followed precisely similar trusts of £3,000 consols, further part of the £12,000, for his daughter Rebecca Clarke

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and her children, with the same limitation in default of children. Another £3,000 was given upon like trusts for his daughter Mary Clarke and her children; and the remaining £3,000 on like trusts for his daughter Frances Clarke and her children, the ultimate limitation over being in each case the same. The residuary estate (subject as to £1,000 to a power of appointment given to the testator's wife) was directed to be held on the same trusts as the £12,000 consols.

The testator died in 1838, leaving his four above-mentioned daughters his sole next of kin.

The testator's daughter Rebecca married, and died in 1839, leaving children. His daughter Sarah G. Clarke died in 1851 a spinster. His daughter Mary died in 1872, leaving no issue. Frances Clarke died in 1875 a spinster.

At the death of Frances Clarke the testator's nearest relation was Thomas Young, the only surviving child of the testator's daughter Rebecca.

The plaintiff was the legal personal representative of 324] Frances *Clarke. The defendants were—the legal personal representatives of Thomas Young, and the trustees of the testator's will. The statement of claim asked for a declaration that the persons entitled to the three legacies of £3,000 consols primarily bequeathed for the benefit of Sarah, Mary, and Frances, were the testator's next of kin, according to the Statutes of Distribution, living at his death, or the legal personal representatives of such of them as were dead.

The case came on for hearing before Vice-Chancellor Bacon on the 29th of May, 1877.

W. C. Renshaw (*Kay*, Q.C., with him), for the plaintiff. *Swanston*, Q.C., and *Everitt*, for the representatives of Thomas Young.

A. Bailey, for the trustees.

The arguments and authorities were the same as on the appeal.

BACON, V.C., held that the next of kin were a class to be ascertained at the death of the last surviving daughter, and not at the death of the testator. In *Bullock v. Downes* ('), which was a decision upon the words of the particular will, the ultimate gift was unto such person and persons of the blood or next of kin of the testator "as would by virtue of the Statute of Distributions have become and been then entitled thereto in case I had died intestate." The time at which the right was to accrue was there plainly and distinctly stated. The period was definitely fixed, and there

(') 9 H. L. C., 1.

was no rule of construction which could violate the express words of the testator. In the present case the testator made provision for his four daughters, who were his sole next of kin, during their lives, and, as far as he could, for their issue, and then, upon failure of all his provisions for his daughters and their issue, he made an ultimate bequest "to such person or persons as will then be entitled to receive the same under the Statute of Distributions." To hold that these words had reference to the period of the testator's death would be doing violence to the testator's express words, *and *Bullock v. Downes* (¹) could not (in his [325 Lordship's opinion) put any such construction on this will as that contended for by the plaintiff. In *Bullock v. Downes* the testator clearly chose the easily ascertainable period of his own death, but in this case he had clearly chosen a different period, which could only be ascertained after a multitude of unforeseen circumstances had happened—when none of the persons he was seeking to benefit were in existence. The next of kin at the testator's death were the very persons to whom he had already given life interests, and it would be idle to suppose that he intended in this roundabout manner to benefit the very persons for whom he had already specially provided. His Lordship came to the conclusion, though not without hesitation, that what the testator intended was, that when the provisions he had made for his daughters, and, as far as he could, their issue, had failed and could no longer have any effect, when there was no hand to receive them, and not till then was it to be ascertained who was entitled to take under the Statute of Distributions.

The plaintiff appealed. The appeal was heard on the 8th of December.

Kay, Q.C., and *W. C. Renshaw* for the appellant: We say that the ultimate gift is to the persons who at the time of the limitation taking effect are the persons entitled, in right of the testator's statutory next of kin at his death. This satisfies the expression "shall be entitled," whereas the respondents read the ultimate gift as if it had been "who would then have been entitled to receive the same as my next of kin under the statute if I had then died." The case is governed by *Bullock v. Downes*; *Cable v. Cable* (²); *Wheeler v. Addams* (³). The judgment of Leblanc, J., in *Doe v. Lawson* (⁴) contains remarks to the same effect.

(¹) 9 H. L. C., 1.

(²) 16 Beav., 507.

(³) 17 Beav., 417.

(⁴) 3 East, 278, 292.

Day v. Day (') is very similar to the present case. *Ware v. Rowland* ('), *Wharton v. Barker* ('), and *Long v. Blackall* ('), turn upon particular words which the court considered to express the intention that the class should be 326] ascertained at the time of *distribution, and which do not occur here. The testator was not contemplating the exhaustion of his daughters' families before the ultimate gift took effect, for, as the preceding limitation is only to the children of the last surviving daughter, it is clear that if the first daughter were to die without issue, then the second and third living children, and then the fourth died without issue, the children of the second and third could only take the shares of the first and fourth under the ultimate limitation. *Seifferth v. Badham* (') shows that the presumption is that a testator in a limitation of this kind is in substance saying that, on the failure of the prior limitations, the law is to take its course.

Swanston, Q.C., and *Everitt*, contra: Taking the words of the will in their obvious natural sense, the order appealed from is clearly right. The fact referred to by the appellant, that the limitation preceding the ultimate gift is only in favor of the children of the surviving daughter, is in our favor, for, on the appellant's construction, a daughter's children born after the testator's death could not take anything unless their mother became the last survivor. We contend that this case falls within the class of cases of which *Wharton v. Barker* (') is a type, and not within *Bullock v. Downes* (') and cases of that class. The authorities show that a mere reference to the Statute of Distributions does not make the death of the testator the period for ascertaining the class of next of kin, and it will be found that in all the cases relied on by the appellant there has been an express reference to the *propositus* dying intestate. This, we submit, is necessary. Thus, in *Long v. Blackall* ('), recognized in *Holloway v. Holloway* (') the class was ascertained at the period of distribution; and so in *Briden v. Hewlett* ('), which is very like the present case, *Butler v. Bushnell* (') and *Clapton v. Bulmer* ('). In *Doe v. Lawson* (') there was a reference to dying intestate. In *Ware v. Rowland* (') and 327] *Cable v. Cable* (') "then" was not an *adverb of time,

(') 4 L. R., Ir. Eq. Rep., 385.

(') 2 Ph., 685.

(') 4 K. & J., 483.

(') 3 Ves., 486.

(') 9 Beav., 370.

(') 9 H. L. C., 1.

(') 5 Ves., 399.

(') 2 My & K., 90.

(') 3 My & K., 232.

(') 5 My. & Cr., 108.

(') 3 East, 278.

(') 16 Beav., 507.

and they therefore do not help the appellant. In *Wheeler v. Adams* ⁽¹⁾ there was a reference to intestacy. In *Holloway v. Radcliffe* ⁽²⁾ the judgment shows that on a will like the present the Master of the Rolls would have decided as the Vice-Chancellor has done. In *Wharton v. Barker* ⁽³⁾, as here, there was no reference to dying intestate, and the class was ascertained at the time of distribution. In *Bullock v. Downes* ⁽⁴⁾ "then" was not an adverb of time, and there was a reference to dying intestate, which was expressly made the *ratio decidendi* at the Rolls ⁽⁵⁾. In *re Morley's Trust* ⁽⁶⁾ is very close on the present case, and is in our favor.

JAMES, L.J.: I am not able at all to take the same view as the Vice-Chancellor has taken in this case. If authority were needed, which I think it is not, the case appears to me incapable of being distinguished from *Bullock v. Downes*, which, having been decided by the House of Lords, is of course binding upon us.

The words are, "the same shall be paid to such persons as will then be entitled," that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute. That was the *ratio decidendi* in *Bullock v. Downes*. It appears to me to be plain that to satisfy that expression you must have a person who can show a title under the Statute of Distributions, and the only persons who can show a title under the Statute of Distributions are the persons who were next of kin at the death of the testator (who was partially intestate) or the persons who represent them.

With regard to what is the plain meaning and intention of this testator according to the common sense meaning of his language, I agree with the Vice-Chancellor's premises, but I am unable to agree with the conclusion which he has drawn from them. The Vice-Chancellor considered that the testator meant to say in *substance, "I provide for [328 my daughters, and, as far as I can, for their issue, and when none of the persons I am seeking to provide for are any longer in existence, then, and not tell then, all my provisions having failed by death, let my property go and be distributed according to the Statute of Distributions. I have made every provision which I think it necessary to make, and when all these fail let the law distribute the property."

⁽¹⁾ 17 Beav., 417.

⁽²⁾ 23 Beav., 163.

⁽³⁾ 4 K. & J., 483.

⁽⁴⁾ 9 H. L. C., 1.

⁽⁵⁾ 25 Beav., 54.

⁽⁶⁾ 25 W. R., 825.

That, as it seems to me, would be the natural meaning to be given to the will without reference to authorities. But on the authorities I think we are bound to say that when the words are that the fund is to be paid "to such persons as will then be entitled to receive the same as my next of kin under the Statute of Distributions," the claimants must show an actual title under the Statute of Distributions.

I am of opinion, therefore, that the order of the Vice-Chancellor must be discharged, and an order substituted for it declaring the title of the persons who were next of kin at the death of the testator.

BAGGALLAY, L.J.: I am of the same opinion. It is of rare occurrence to find a case so completely on all fours with another case as is the present case with the case of *Bullock v. Downes* (*). In this case the consols are to be paid on the decease of the surviving daughter to such person or persons as shall be entitled to receive the same under the statute. In the case of *Bullock v. Downes*, in like manner, the trustee was to stand possessed of the trust property in trust for such person or persons as would by virtue of the Statute of Distributions have become entitled thereto at the time of the death of the testator's son in case the testator had died intestate. The words are equivalent. It has been suggested that the case of *Wharton v. Barker* (*), which was decided before *Bullock v. Downes*, proceeded on a distinction which is to be found in the present case, but I do not find that it went on any such ground. The Vice-Chancellor in that case says that (*) "neither the circumstance of there being a 329] previous bequest for life or other limited period, *nor the circumstance of the person to whom that previous bequest is made being also one of the next of kin of the testator at the time of his death, will prevent the court from holding that the time at which the class is to be ascertained is the time of the testator's death, and not that fixed by the will as the period for distribution. Such being the general rules, their application can only be prevented by a clear indication in the will, that, in the particular limitation in question the testator did not intend them to be applied. For this purpose the intention must be shown in language clear and unambiguous. Mere words of futurity are insufficient. As to this some of the authorities have gone very far. A gift 'to one for life and afterwards to those who shall be my next of kin (and not who *then* shall be my next of kin)' has been held not to be sufficiently clear and unambiguous to prevent the rule from applying." The Vice-Chancellor then went

(1) 9 H. L. C., 1.

(2) 4 K. & J., 483.

(3) 4 K. & J., 489.

into the consideration of the particular words which he found in that case, and was of opinion that they did clearly and distinctly point to another period as the period at which the class was to be ascertained.

THESIGER, L.J.: I am of the same opinion both upon the authority of the cases cited and also upon my own independent view as to the meaning of the clause which we have to construe.

The cases which have been cited seem to me to divide themselves into three classes. The first of these classes is the one where the word "then," the adverb of time, is attached to the description of the class, and in that case, as in *Wharton v. Barker* (*) and *Long v. Blackall* (*), it was decided that the word "then" imported that the class was to be ascertained at the time so pointed out, i.e., at the period of distribution. *Wheeler v. Addams* (*) is to a certain extent an exception from that rule, but I think that may be explained, because we find in that case there is in the limitation an exception of the tenant for life on whose death the limitation was to come into force. This showed that the class must be ascertained at an *earlier period than his death. Now that is the [330 only class of cases on which reliance can be placed on behalf of those who support the Vice-Chancellor's decision.

The second class of cases is where words of futurity, but without the adverb of time, are attached to the description of the class, and in that class of cases we find no distinction drawn, but in every one of them it was held that there the words must speak from the time of the testator's death. The cases cited on that point were *Holloway v. Holloway* (*) and *Doe v. Lawson* (*).

The third class of cases is where the word "then," the adverb of time, is used, but where we find it used, not in connection with the description of the class, but in connection with the time at which the estate is to come into being. In that class of cases also, without any exception, we find that it has been decided that the class is to be ascertained at the time of the testator's death. That is to be found in *Cable v. Cable* (*), *Bullock v. Downes* (*), and in *Day v. Day* (*); and it is to be observed that in all these cases we do not find that any distinction is drawn from the fact of the use of the words "if he had died intestate," as has been argued by Mr. Swanston, but we find in all of them that the

(1) 4 K. & J., 483.

(2) 3 Ves., 486.

(3) 17 Beav., 417.

(4) 5 Ves., 399.

(5) 3 East, 278.

(6) 16 Beav., 507.

(7) 9 H. L. C., 1.

(8) 4 L. R., Ir. Eq. Rep., 385.

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learned judges who decided them considered the question to be whether the word "then" was attached to the description of the class or to the time when the estate is to come into being.

Now, that being the state of the authorities, there can, as it seems to me, be no doubt that this case comes within the two latter classes of authorities, for we find that the word "then" is not attached to the description of the class, but is most distinctly attached only to the words which import the time when the estate is to come into being, "to such person or persons as will then be entitled to receive the same." Then follow the words "As my next of kin under the Statute for the Distribution of Intestates' Estates." Those words have been held by themselves in all the cases to import what their natural meaning imports clearly, viz., the next of kin at the time of the testator's death. Therefore it seems to me that the authorities are quite in accord with the natural [331] *view of the construction to be put on these words, namely, that after the estates had failed which the testator had previously specifically given by his will, he had left his property to be dealt with as the law would require it to be dealt with if he had made no further disposition.

Solicitors: *C. Langley; Boulton & Sons.*

See *Wilde v. Wilde*, 58 How. Pr. R., 71.

[7 Chancery Division, 332.]

M.R., Nov. 16, 1877.

332] *NORTON V. FLORENCE LAND AND PUBLIC WORKS COMPANY.

[1877 N. 90.]

Obligation—Bond or Mortgage—Charge on Property in Foreign Country—Jurisdiction of Foreign Court.

A company with an office in London, and having house property at Florence, raised, under powers in their articles, a sum of money by the issue of "Obligations" payable to bearer, whereby they purported "to bind themselves, their successors and assigns, and all their estate, property, and effects," reserving the right to redeem a certain part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mortgage in the Italian form, registered at Florence, the company mortgaged the property to a bank with a London office, who had notice of the obligations. The bank having taken proceedings in the tribunal at Florence to enforce their mortgage, an action was brought on behalf of the holders of the obligations against the company and the bank, claiming to be mortgagees of the Florence property in priority to the bank. On motion to restrain the sale of the property:

Held, that the obligations were not mortgages, but simply bonds:

Held, also, that even if they created a charge on the company's property, they

could not be enforced as against the bank claiming under a registered mortgage at Florence; and that, the matter being already before the tribunal of the country where the property was situated, this court would not interfere.

THIS was a motion on behalf of the holders of obligations issued by the Florence Land and Public Works Company to restrain the Anglo-Italian Bank from selling the company's property at Florence, of which they were mortgagees.

The company, whose property consisted partly of land and houses at Florence, was registered under the Companies Act, 1862, with an office in London. By the articles of association it was empowered to issue "debenture bonds" and "mortgage bonds."

In 1868 the company, under the powers of the articles, issued obligations in the following form:—

"Obligation.

"Total issue, £250,000.

"No.

"£100.

"The Florence Land and Public Works Company, Limited, in *consideration of the sum of £100 advanced and [333 lent to them by , do hereby, in pursuance and under the power of their articles of association, bind themselves, their successors, assigns, and all their estate, property, and effects, to pay to the said , or bearer, on presentation of this bond at the registered office of this company in England, the said principal sum of £100 on the 24th day of June, 1875, and also interest on the said principal sum of £100 until paid, at the rate £6 per cent. per annum, at the times and places mentioned in the coupons attached hereto: Provided also, and it is hereby declared, that this bond is issued subject to the condition and scale indorsed hereon.

"Given under the common seal of the company by order of the board, the 24th day of June, 1868."

The following was the condition indorsed:—

"The company reserves the right of redeeming this and as many other obligations as the directors may think fit in each year, commencing with the year 1871; but in no case shall the amount of obligations to be redeemed in any one year be less than the amount specified in the scale hereunder written: the obligations to be redeemed in each year shall be determined by drawings at the officer of the company, in the presence of two directors and a notary public, on the 1st day of May in each year; and shall become payable, with the accruing interest, on the 30th day of June following.

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“The drawings on the

1st May, 1871, will be for £10,000

“ 1872 “ 15,000

“ 1873 “ 20,000

“ 1874 “ 25,000

“ 1875 “ 35,000

“ 1876 “ 40,000

“ 1877 “ 50,000

“ 1878 “ 55,000

£250,000.”

In March, 1871, the Anglo-Italian Bank, which had an office in London, entered into an agreement with the company to open a *credit in the company's favor for £50,000, the amount, together with future advances, to be secured by a mortgage upon the property of the company in and near Florence. This was accordingly executed in the Italian form on the 30th of March, 1871, and registered at Florence, to secure £50,000, and a further sum of £5,000.

On the 14th of August, 1877, the company was served in Florence with a citation to appear before the Civil and Correctional Tribunal of Florence, at an audience to be held on the 29th of August, 1877, to hear accorded executive force in the kingdom of Italy to the said mortgage, and to hear authority given to the proper officer for the execution thereof. This citation was issued at the instance of the bank in order to enforce their security, and judgment was obtained thereon giving validity to the deed, and enforcing payment. The bank were about to take steps for the sale of the property.

The plaintiff, a holder of the said obligations, thereupon brought his action, “on behalf of himself and all other the holders of mortgage debentures issued by the company,” against the said company and the Anglo-Italian Bank as defendants, claiming a declaration that the plaintiff and the other debenture holders were mortgagees of the company's property at Florence in priority to the bank, and an injunction to restrain the sale of the company's property at Florence.

The plaintiff now moved that the bank might be restrained from selling the whole or any part of the estate, property, and effects of the company, at Florence or elsewhere, of which the bank claimed to be mortgagees.

The plaintiff alleged that the bank had notice of the charge on the property created by the obligations. No evidence was adduced as to the rights of the parties according to the law of Italy.

Chitty, Q.C., and *Cozens-Hardy*, for the plaintiff: The plaintiff, as representing the other holders of the obligations issued by the Florence Land and Public Works Company, is entitled to a charge upon the company's property at Florence in priority to the bank, who are subsequent mortgagees with notice, as we contend, of our charge. The bank is therefore *bound by the same equity as their mort- [335] gagers, and they cannot obtain, by virtue of any foreign law, a valid security to oust ours of which they have notice: *Ex parte Pollard* ⁽¹⁾.

It is true that this court has no jurisdiction over the land in a foreign country which is the subject of the mortgage contract, but it can exercise jurisdiction as against the parties to the contract in this country, namely, the bank, and prevent them from dealing with property affected by our charge. If, as we contend, the bank had notice of a contract under which we are entitled to compel the mortgagor to convey to us the legal estate, they cannot go and convey away that estate to the prejudice of our rights. The fact of the property itself being subject to foreign law is for this purpose immaterial.

In *Lord Cranstown v. Johnston* ⁽²⁾ it was laid down by Lord Alvanley that, with regard to any contract made in equity between persons in this country respecting lands in a foreign country, the court will hold the same jurisdiction as if the property was situated in England.

[JESSEL, M.R.: That must be understood as limited to jurisdiction *in personam*.]

Penn v. Lord Baltimore ⁽³⁾ is an illustration of the same thing. The court has in several cases appointed a receiver in respect of property abroad, and then exercised jurisdiction over it indirectly.

In *Martin v. Martin* ⁽⁴⁾ a mortgage of property in Demerara was held to be valid though the property was subject to a settlement, of which the mortgagee had notice, but which was a nullity in Demerara, disabling the husband and wife from dealing with it.

The question may be raised, whether the obligations—debentures, as we term them—can bind the property at all; but we contend that the words “estate, property, and effects” are quite sufficient to create a lien or charge, so as to bind all the company's land at Florence or elsewhere. They are redeemable instruments, and all the holders of any one issue are entitled *pari passu*.

⁽¹⁾ Mont. & Ch., 239.

⁽²⁾ 3 Ves., 170.

⁽³⁾ 1 Ves. Sen., 444.

⁽⁴⁾ 2 Russ. & My., 507.

J. D. Davenport, for the company.

336] **Davey*, Q.C., and *Millar*, for the Bank, were not called on, but mentioned *Norris v. Chambers* (').

JESSEL, M.R.: I am of opinion that the motion fails, and I think it ought to fail on every ground suggested. In the first instance, I assume that the instrument created a charge on property; it would then be a charge on all the property and effects of the company. It appears that the company had houses and land in Florence, which, of course, is out of my jurisdiction, and would be subject to the law of Florence and to Italian law. It also appears that the defendants, the bank, advanced money to the company, and took a mortgage which was registered according to the law of Florence, and, as they insist, takes priority over every unregistered charge. That may or may not be so, the Italian law not being proved before me by the plaintiff, and it is for him to show that he has a charge according to the Italian law.

Now he has not proved it, because he has not proved the Italian law; therefore I must for the present purpose assume, as against him, that there is a want of registration, or that otherwise he has no charge. But then he says, Not having a charge according to the Italian law on the houses in Florence, I am still entitled to take them away from those who are entitled to them according to the Italian law, for this reason: I have a contract by the former owner of the houses to convey them to me—I am putting it as strongly as possible in his favor—and the present defendants have obtained a conveyance of the house which was more valid according to the Italian law, with notice of my prior contract, and I am entitled to enforce that contract not only against the contracting party, but against every person who had notice of that contract.

The answer is very simple. It depends on the law of the country where the immovable property is situated. If the contract according to the law of that country binds the immovable property, as it does in this country, when for value, that may be so, but if it does not bind the immovable property, then it is not so. You cannot by reason of 337] notice to a third person of a contract which *does not bind the property thereby bind the property if the law of the country in which the immovable property is situate does not so bind it. That would be an answer to the claim so far as regards the notion that mere notice would do.

But there is another answer to the plaintiff's motion. It seems that these houses being in Florence the bank has

(') 29 Beav., 246; 3 D. F. & J., 583.

taken proceedings in the court of Florence, the proper court having jurisdiction, to establish their title; and the litigation there to which the plaintiffs are or may be parties being in the court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this court should actively interfere between the same litigants. That also appears to me to be an answer to this application.

But there is a third, and, in my opinion, a fatal answer, which is, that if the law of England does apply, still, as I read this document, the plaintiff has no charge on the houses in Florence. That is, supposing it were property in London instead of in Florence, I should hold that the plaintiff had no charge on it whatever. That depends on the construction of the instrument which I have before me. It seems that the Florence Land and Works Company are authorized to issue bonds and mortgages. The question is, whether the document which they did issue was a bond or a mortgage. In my opinion it is a bond.

First of all, and that is a very strong point as between the parties, they themselves call it a bond. Now there are two terms by which English lawyers designate bonds, both well known terms, one is bond and the other is obligation. Oddly enough, we generally use the term bond to distinguish the instrument, and the terms derived from obligation or from oblige, to distinguish the parties to it. We speak of a bond, and of the obligor and the obligee of a bond. But still the word "obligation" denotes a bond as well as the word "bond."

Now this instrument is headed by the word "obligation," in very large letters. But this is not all. "In consideration of the sum of £100 the company bind," which is a term of a bond, "themselves, their successors, assigns, and all their estate, property, and effects," to pay to John Norton £100, with interest. *The words "estate, property, [338 and effects," themselves are common words of a bond. They bind themselves to pay, and then follows the common condition on a bond, "Provided always, and it is hereby declared that this bond is issued subject to and in accordance with the conditions of a scale indorsed hereon." So that we have it called "a bond," and it is subject to a condition, and when we look at the condition we find the common condition to pay: "The company reserves the right of redeeming this, and any other obligations as they think fit," by drawings. And then they redeem them in the way they

mention. The bond becomes payable with accruing interest on the 30th of June following the time when it is drawn. That is very important, because, although in the body of the bond the sum is made payable to the bearer, the condition does not make it payable to bearer on presentation, but delays the payment until the time mentioned after each drawing. That being so, there is nothing to show that it is otherwise than a bond.

The words relied on are these: it is said they not only "bind themselves, their successors, and assigns," but "all their estate, property, and effects." Of course they do: a bond always does in a sense bind the property. In the case of a corporation it can bind nothing else; it never could bind the persons who were corporators, and now, in the case of an individual, it does not even bind him in his person, but in his property as far as it can; that is, in legal course, it binds his property generally, just as property was always bound to pay debts on judgment, and in no other way.

Any different interpretation will lead to the most wonderful results. First of all, if it is a mortgage it should take effect in order of date, and if some thousands were issued on several days, is each one to take precedence of the others according to date? It was argued, No, they take *pari passu*, because they were issued as part of the capital of half a million, and the words "capital half a million" are upon it. That will not do, that does not show it. If there are no words in the instrument to make them pay otherwise than according to date, according to our law, they take according to date. If they take according to date, what is the meaning of tossing them into a box and drawing them so many at a time, paying those drawn and leaving the others 339] unpaid? How could you pay those and leave the others unpaid if the others have a prior charge on the property, and you cannot make the property available for payment? It seems to me that the words of the thing, and the reason of the thing, all point the same way: it is a bond and nothing more, and I so hold. The motion must be refused with costs.

Solicitors for plaintiff: *Ashurt, Morris, Crisp & Co.*

Solicitors for defendants: *Worthington, Evans & Cook*;
G. M. Clements.

[7 Chancery Division, 339.]

M.R., Nov. 26, 1877.

HARRISON V. JACKSON.

[1877 H. 409.]

Will—Specific Legacy of Stock—Change of Investment—Ademption.

Bequest of "£1,000 D Stock in the London and North Western Railway Company, now standing in the names of the trustees of my settlement, and bequeathed to me by my late wife (and which stock it is my intention to have transferred into my name), unto A., B., and C. upon trust for A." The stock was never transferred into the testator's name, but was paid off by the company and reinvested, by his desire, in the purchase, in the names of the settlement trustees, of other securities:

Held, that the legacy was adeemed, and that the residuary legatees were entitled to the securities.

Le Grice v. Finch (1) and *Clark v. Browne* (2) disapproved.

SPECIAL CASE. W. R. Jackson, by his will, dated the 11th of May, 1874, made the following bequest: "I give and bequeath £1,000 D Stock of the London and North Western Railway Company, the sum of £1,165 £8 per Cent. Perpetual Preference Stock of the Furness Railway Company, and the sum of £3,000 capital stock of the Lancashire and Yorkshire Railway Company, which are now standing in the books of the several companies in the names of G. Crosfield, P. Martin, and G. B. Ashworth, the trustees of my marriage settlement, and which have been bequeathed to me by my late wife under a power enabling her so to do contained in the said marriage settlement (and which stock it is my intention to *have transferred into my name as [340 soon as conveniently can be done), unto G. K. Harrison, C. Harrison, and Arthur Bailey, upon trust for the said G. K. Harrison, if he shall be living at the time of my death." And the testator gave the residue of his estate to the same trustees upon the trusts therein mentioned, and appointed them his executors.

At the date of the will the said sums of stock were standing in the books of the several companies, in the names of the trustees of the settlement in the will mentioned, and no part thereof was transferred into the name of the testator.

Shortly after the date of the will the £1,000 D Stock of the London and North Western Railway was paid off by the company, and the amount was, by the request of the testator, immediately before his death, reinvested in the purchase of eighty-eight new shares in the Lancashire and Yorkshire Railway Company in the names of the said G.

(1) 3 Mer., 50.

(2) 2 Sm. & Giff., 524.

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Harrison v. Jackson.

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Crosfield, P. Martin, and G. B. Ashworth. The testator died on the 17th of July, 1875.

The question for the opinion of the court was, whether the eighty-eight new shares in the Lancashire and Yorkshire Railway Company belonged to the plaintiff as specific legatee under the will, or whether the same formed part of the testator's residuary personal estate.

Davey, Q.C., and *Rawlins*, for the plaintiff: The bequest of the £1,000 D Stock of the London and North Western Railway was in trust for the plaintiff, and cannot be taken to have been adeemed by its reinvestment in the purchase of the new shares.

In *Le Grice v. Finch* (') a bequest of £500, described in the will as being out upon mortgage, was held not to have been adeemed, although the testatrix had called in the mortgage money.

So in *Clark v. Browne* ('), where a testator gave to his legatees "the amount of whatever sum or sums of money might be received" from his claim on a certain estate, and invested the greater part of the sums so received in his own name, but sold a portion, it was held that there was no ademption. 341] On the principle *of these cases we contend that there was no ademption here. The testator bequeathed a certain fund bequeathed to him by his wife under the power in their marriage settlement; that was the subject-matter of the bequest, and it cannot be affected by the change of investment.

Chitty, Q.C., and *Alfred Bailey*, for the residuary legatees.

JESSEL, M.R.: If I were allowed to guess what was the intention of the testator in this case and in other cases where specific bequests have been held to be adeemed, I should say that the doctrine of ademption very often defeats that intention.

But the law is, that a specific legacy is adeemed when the subject-matter of it has been aliened by the testator in his lifetime. I cannot read the gift in this will as the gift of a particular fund coming from the testator's wife. All he gives is the "£1,000 D Stock of the London and North Western Railway Company," which he describes as "standing in the names of the trustees of my marriage settlement, and which have been bequeathed to me by my late wife;" one part of the description is not more essential than another, and it is to be observed that the reference to the wife's bequest comes after the names of the trustees. There is also

(') 3 Mer., 50.

(*) 2 Sm. & Giff., 524.

on the face of the will a clear intention on the part of the testator not to allow the fund to remain in their names. This sum of D Stock was paid off in the lifetime of the testator, and the money arising therefrom was reinvested in other securities, which were transferred almost immediately before the testator's death into the names of the trustees of the settlement. The testator then has, as it were, sold the D Stock, and bought something else with the money. To my mind there is no difference whether that money was applied to buy shares or horses or anything else. He has applied his own money to buy something which is not the specific article bequeathed by him.

There would, I think, be nothing to say for this point were it not for the authority of some decisions which have been cited. Those decisions being decisions on different instruments are not binding upon me, not even though they were fairly in point. The first case *is that of *Le Grice v. Finch* (¹), before Sir William Grant. I must say I cannot bring my mind to the same conclusion as that to which that learned judge came. The case was as follows: E. D., by her will, reciting that it was the wish of her mother and herself that the £500 they had then out on mortgage should be given to the plaintiff, bequeathed the said £500 accordingly. The testatrix, after the death of her mother, called in the mortgage, and applied part of the money to her own immediate purposes, and invested the remainder in stock.

Now the mortgage having been called in, the mortgage money belonging to the testatrix was received by her during her life, and applied by her in effect in purchasing something. That which went to purchase household necessities and consols was completely gone. The property which she had bought remained, but it was not the money out on mortgage. Sir W. Grant said this (²): "The essential characteristic of the legacy is that it consists of a sum in which the testatrix admits that her mother and herself had some sort of joint interest, and which they were both desirous of giving to Mrs. Le Grice and her family. This characteristic was not at all dependent on the particular security on which the money might be placed. The testatrix considers the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the £500 'we have now out on mortgage.' That is descriptive of the present situation of the money. The next day it might not be out upon mortgage. But it would still be the £500 in which the mother

(¹) 3 Mer., 50.

(²) 3 Mer., 52.

and the daughter had a joint interest; and which, at the time of the will, they had out upon mortgage. The thing given is not the mortgage but the money. It is the *said sum* of £500 that she gives to her executors. What is this *said sum*? That sum of £500 which belonged to her and her mother, and which at a given time was out upon mortgage. Whether it remained out upon mortgage at the time of the testatrix's death appears to me to be a matter of indifference. That circumstance is no ingredient in the gift, either by way of condition, or of inherent description."

If that be so, then the judge held that what was given was the £500 in which "my mother and myself have a joint interest," and "therefore if the testatrix had invested the money in the purchase of carriages and horses, they would have passed under that bequest. I cannot agree with the view of the learned judge. But if I did agree, it must follow that, in whatever shape or way you may have made the disposition of the money, it would have passed, because it is a gift not only of the money out on mortgage, but of the proceeds of the fund however invested. It does not appear to me that that is the true construction to be put upon the gift in that will, for I hold these cases to be always cases of construction.

The other case was *Clark v. Browne* (¹), in which a testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son and the other two-third parts to his wife and his son-in-law for their lives, with remainder to the son. The larger part of the amount was after the date of the will received by the testator, and invested in his name in consols, some small part of which he sold but afterwards repurchased in part. The Vice-Chancellor Stuart held, on the principle of civil law, that the testator having set apart a specific fund received by him in order that it might be expressly reserved for the benefit of the legatee, it was not adeemed. Now, I say nothing as to the civil law, because it was not the fact that a specified fund was set apart by the testator for the legatee, indeed he had sold out a part. The Vice-Chancellor observed (²): "If the sums received by the testator under the orders of this court had been mixed with the general mass of his property, there would have been more room for the argument in favor of extinction and ademption. But so far from thus mixing the amount received, he invested that amount as a separate fund in £3 per cent. stock. It is a

(¹) 2 Sm. & Giff., 524.

(²) 2 Sm. & Giff., 529.

singular circumstance that he sold out small parts of this stock, and as to part of what he had sold out he repurchased stock; but it is certain that there remained at the time of his death the amount of stock originally invested, after deducting the small sums sold, but increased by the reinvestments which I have mentioned."

I must say I cannot reconcile that case with the doctrine of ademption. If a man by will gives a debt, and he is paid that debt in his lifetime, and with the money buys a horse or a *perpetual annuity, the horse or annuity does [344 not pass. That one authority does not seem to me to be consistent with the ordinary rules of law on the question of ademption.

The question must be answered accordingly, that these shares form part of the residuary personal estate of the testator.

Solicitor for plaintiff: *G. J. Brownlow*, agent for Harwards, Shepherd & Mills, Stourbridge; *Chester & Co.*

[7 Chancery Division, 344.]

M.R., Dec. 12, 1877.

HINE V. CAMPION.

[1877 H. 43.]

Evidence—Action for Misrepresentation on Sale of Goods—Scienter—Belief as to Truth of Representation.

In an action against a vendor for misrepresentation on the sale of goods, if it is shown that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, he cannot be asked in chief whether he believed the representation to be true.

THIS was an action to recover damages against the defendant for alleged misrepresentation on the sale by him to the plaintiff of certain stocking frames.

Davey, Q.C., and *Vaughan Hawkins*, for the plaintiff.
Chitty, Q.C., and *Whitehorne*, for the defendant.

In the course of the examination in chief of the defendant he was asked as to the representations he had made to the plaintiff on the sale of the machines, and the following question was put to him: "Did you believe your statement to be true?"

JESSEL, M.R., intimated that he considered that such a question could not be properly put.

The following authorities were referred to: *Taylor v. Ashton* ('); **Evans v. Collins* ('); *Collins v. Evans* ('); [345

(') 11 M. & W., 401.

(') 5 Q. B., 804.

(') 5 Q. B., 820.

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Hine v. Campion.

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Evans v. Edmonds (¹); *Milne v. Marwood* (¹); *Ormrod v. Huth* (¹); *Benjamin on Sales* (¹).

JESSEL, M.R.: Where there is an action against a vendor for misrepresentation on the sale of goods, if it is shown that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, the question cannot be asked him as to whether he did or did not entertain some other belief as to its truth, as the court cannot enter into any question as to the state of a man's mind when the representation was made.

Solicitors for plaintiff: *Duncan, Murton, Warren & Gardner*, agents for Watson & Wadsworth, Nottingham.

Solicitors for defendant: *Wilkins, Blyth & Fanshawe*, agents for G. H. Blackwell, Nottingham.

(¹) 13 C. B., 777, 786.

(²) 14 M. & W., 651.

(³) 15 C. B., 778.

(⁴) Pages 359-368.

See note to *Hart v. Swaine*, *ante*, p. 395, 14 Albany Law Journal, 385-7.

The principal case seems to proceed upon the theory, that as the undisputed proof showed the party knew his representation to be false, his own evidence that he believed them to be true was immaterial, as it would not have conflicted with the theory that he knew they were false.

On an issue of fact as to whether an assignment or transfer of property was made to hinder, delay or defraud creditors, it is competent, where the assignor is a witness, to inquire of him whether in making the assignment or transfer he intended to delay or defraud his creditors: *Seymour v. Wilson*, 14 N. Y., 567.

Georgia: See, however, *Green v. Akers*, 55 Geo., 159.

Massachusetts: *Snow v. Payne*, 114 Mass., 520, 526; *Thatcher v. Phinney*, 7 Allen, 146, 149.

New York: *Seymour v. Wilson*, 14 N. Y., 567, 15 How. Pr., 355; *Griffin v. Marquadt*, 21 N. Y., 121; *Forbes v. Waller*, 25 N. Y., 430; *McKown v. Hunter*, 30 N. Y., 625, 628; *Thurston v. Cornell*, 38 N. Y., 281; *Bedell v. Chase*, 34 N. Y., 386; *Cortland v. Herkimer*, 44 N. Y., 22; *Pope v. Hart*, 35 Barb., 630; *Black v. Ryder*, 5 Daly, 304; *Perse v. Willet*, 1 Rob., 131.

See, however, distinguishing from rule: *Ballard v. Lockwood*, 1 Daly, 159,

164; *Jessop v. Miller*, 1 Keyes, 331, 4 Abb. App. Dec., 457; *Dillon v. Anderson*, 43 N. Y., 231, 236; *Ross v. Ackerman*, 46 N. Y., 210; *Waugh v. Fielding*, 48 N. Y., 681; *Brown v. Champlin*, 66 N. Y., 214; *Newell v. Doty*, 33 id., 94.

Ohio: See, however, *Bolen v. State*, 26 Ohio St., 371; *Haywood v. Foster*, 16 Ohio, 88.

Wisconsin: *Wilson v. Noonan*, 35 Wisc., 321.

See, however, distinguishing from rule, *Flanders v. Cottrell*, 36 Wisc., 565; *Giffert v. West*, 37 Wisc., 115.

Though should the party swear that he had no interest to defraud, his statement is by no means conclusive.

New York: *Newman v. Cordell*, 43 Barb., 449; *McKown v. Hunter*, 30 N. Y., 628.

On the trial of an indictment for obtaining an indorsement of a note by false pretences, it is proper for the prosecutor to state what influence the representations of the defendant had upon him by way of inducing him to indorse the note: *People v. Miller*, 3 Parker's Crim. Rep., 197.

So, where the issue is as to fraud in representations, the party to whom representations are made may testify that he entered into the contract relying on such representations: *Smith v. Countryman*, 30 N. Y., 655.

In a suit upon a life insurance policy, it is competent to prove by a physician

who made a written statement, the truth of which was in issue, that he made the statement in good faith: *Rawls v. American, etc.*, 27 N. Y., 282.

In seduction, the evidence of the seduced female is admissible that the promise of marriage was the inducement to the illicit intercourse: *Kenyon v. People*, 26 N. Y., 204.

Where the ground of contest of an election was that the party elected had lost his residence by leaving the state, the contestant called the claimant as a witness, and, whilst he was on the witness' stand, one of the jurors asked him what was his intention when he went away—was it to make a visit or for some other purpose? The contestant objected to the question and the court sustained the objection. Held, that the testimony called for by the question was proper, and it was error to exclude it: *Wilkins v. Marshall*, 80 Ills., 75.

So, where a physician is sued for mal-

practice, he may be asked whether he exercised the best judgment and skill of which he was capable: *Fisher v. Nicholls*, 1 Chicago Law Journal, 142, 2 Bradwell, 484.

A question to the person injured, viz.: "State to the jury the effect of that injury upon you, and how your situation is?" is unexceptionable where the answer merely details the nature and extent of the injury, and states only facts within his knowledge, and not matters of opinion requiring professional skill in their just formation: *Creed v. Hartman*, 8 Bosw., 123, affirmed 29 N. Y., 591.

A party discharged, but did not conceal, a witness who was subsequently examined by the other party. It was not error for the court not to permit the party to be asked whether he discharged the witness on account of an apprehension that he would testify to certain facts: *Thornton v. Thornton*, 39 Vermont, 123.

[7 Chancery Division, 358.]

M.R., March 28; May 4; Dec. 18, 1877.

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[1877 P. 36.]

Action for Partition—Receiver—Judicature Act, 1873, s. 25, subs. 8—Partition or Sale—Partition Act, 1868 (31 & 32 Vict. c. 40), s. 4.

In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the court has jurisdiction under the Judicature Act, 1873, s. 25, subs. 8, to appoint a receiver until the hearing.

An estate consisting of a mansion house and 185 acres belonged to the plaintiff and the defendant in equal moieties. It was almost surrounded by a larger estate, of which the plaintiff was tenant for life, and with which it was formerly united as part of the same family estate. In an action for partition or sale the plaintiff desired a partition under which the mansion house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate; he offering to pay what should be necessary for equality of partition. The defendant, who was also a neighboring landowner, desired a sale, and had offered, on the writ being issued, to submit to an immediate decree for sale:

Held, that, under sect. 4 of the Partition Act, 1868, as "no good reason to the contrary" of a sale had been adduced, a sale must be directed.

THIS was an action for partition or sale of a freehold mansion house known as Heywood House, and the outbuildings, gardens, and pleasure grounds, and a portion of the lands belonging thereto, and of certain lands forming part of Apsley Farm, in the parish of Westbury, and comprising in the whole 185 acres or thereabouts, whereof fifty-eight acres

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or thereabouts, part thereof, formed the site of the said mansion house, grounds, and park, and the residue consisted of pasture and arable lands.

These hereditaments, called in the pleadings "the partition lands," devolved in 1841 upon Henry Ludlow for life, and, upon his death, in the events which happened, as to one moiety on the defendant Sir H. C. Lopes in tail, and as to the other moiety by virtue of subsequent instruments on the plaintiff E. E. Porter as tenant in fee.

Henry Ludlow was also owner in fee under another title of other lands (which, as well as the partition lands, formerly 359] belonged to *a maternal ancestor of the plaintiff and defendant), called in the pleadings "the settled estates," and consisting of about 1,800 acres, and which partly surrounded and were partly intermixed with the partition lands. These estates he by his will devised to his nephew, the plaintiff, for life, with remainder to his great-nephew R. K. Lopes, who was a nephew of the defendant, in fee.

Henry Ludlow resided in the said mansion house from 1841 till his death, in August, 1876. There was no mansion house on the settled estates.

When the plaintiff and defendant became co-owners of the partition lands the plaintiff was tenant for life of the settled estates, and the defendant was owner of other estates in the neighborhood.

On the 12th of February, 1877, the plaintiff issued his writ. On the 15th of February, 1877, the defendant's solicitors by letter offered to take an immediate decree for sale in lieu of partition without any statement of claim being delivered. The plaintiff, who desired partition, did not accept this offer.

On the 23d of March, 1877, a motion was made on behalf of the defendant for the appointment of a receiver. It appeared that the plaintiff was in occupation of that part of the property which comprised the mansion house, but there was no exclusion by him of the defendant, the co-owner.

Davey, Q.C., and *Ingle Joyce*, in support of the motion.

Chitty, Q.C., and *Morshead*, for the plaintiff, referred to *Sandford v. Ballard* (*).

JESSEL, M.R., considered that, under the Judicature Act, 1873, s. 25, subs. 8, the court had jurisdiction to appoint a receiver until the trial, although there was no exclusive occupation, and said he should do so in this case unless the plaintiff elected to pay an occupation rent.

On the 4th of May, 1877, the motion was again brought

(*) 30 Beav., 109; 33 Beav., 401.

on, and the plaintiff having elected to pay an occupation rent for the mansion house and such other parts of the property as were in his occupation, it was ordered that it be referred to chambers to *settle the amount so to be paid. [360 An occupation rent at the rate of £350 a year was afterwards agreed upon.

On the 29th of May, 1877, the statement of claim was delivered.

The plaintiff alleged that the mansion house commanded fine and extensive views, and formed a residence suited to the property with which it had hitherto been held; that portions of the settled estates had been thrown into and formed part of the park in front of the mansion house, and if such portions were let for building purposes, the view from the mansion house would be seriously diminished; that the value of the mansion house, gardens, and pleasure grounds, if severed from the settled estates, and the value of the settled estates, if severed from the mansion house, would be seriously diminished, inasmuch as the settled estates would cease to be a residential property unless a new mansion house were erected on a new site, and the existing mansion house, with only a few acres of land, would not be suited for the establishment or requirements of a resident landlord, and would not command the same class of tenants as if it formed the mansion house of and was let with a substantial estate.

The plaintiff further alleged that the partition lands consisted of two almost isolated portions, into which they could very readily, and with advantage to each of the co-owners, be divided.

The plaintiff further alleged that if the mansion house were detached from the bulk of the family estates it would be prejudicial to his interests; that the mansion house could not be sold to advantage under existing circumstances; and he submitted that such sale ought not to be ordered at the instance of the defendant, in opposition to that of the plaintiff, as co-owner of the partition lands.

Under the circumstances before stated, the plaintiff was desirous that the partition lands should be partitioned between and allotted in severalty to himself and the defendant, and that the mansion house and a portion of the land usually held therewith should be allotted to himself, and the residue to the defendant, the plaintiff paying to the defendant such sum as might be necessary for equality of partition. He submitted that there was good reason why a sale of the partition

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lands instead of a partition ought not to be ordered, and claimed a partition accordingly.

361] *The defendant delivered a statement of defence and counter-claim on the 6th of July, 1877, and submitted that, as immediately after the service of the writ the defendant's solicitors had offered to submit to an immediate decree or judgment for sale in lieu of partition, without any statement of claim being delivered, the costs of the action, or at all events the costs subsequent to the said 15th of February, 1877, ought to be borne by the plaintiff.

The defendant claimed that the partition lands should be sold under the Partition Act, 1868, and he denied that this mode of dealing with it would be disadvantageous to any of the parties interested. He stated that he was himself desirous of buying the mansion house and grounds for his own occupation, and was willing to purchase the plaintiff's share, that it would form a desirable addition to the defendant's own property in the neighborhood, and that it was in itself a valuable property apart from any adjacent estates.

Dec. 18, 1877. The action now came on for trial.

Chitty, Q.C., and *Morshead*, for the plaintiff: The plaintiff in this case desires a partition, and notwithstanding the wish of the defendant for a sale, we contend that there are reasons in this case why the decree should be for partition rather than for sale. The plaintiff is tenant for life of a large estate called in the pleadings "the settled estates," in the immediate neighborhood of the property in question, consisting of about 1,800 acres, on which there is no mansion house, and which formerly formed part of the same ancestral property. It would be obviously desirable that the mansion house and the settled estates should be in the same hands. Moreover, the salable value of the mansion house may be much diminished by the fact that the view from the mansion house may at any time be obstructed by the owner of the settled estates. The settled estates are intermixed with and almost surround the land immediately adjoining the mansion house, and a partition could very conveniently be made, giving the plaintiff the mansion house and pleasure ground and the land adjoining, and the residue to the defendant, the plaintiff paying to the defendant a proper sum for equality of partition.

362] *In *Clarendon v. Hornby* (¹), where an estate consisted of a great house and of a farm and lands about it, and two-thirds of the estate belonged to the plaintiff Bligh and his wife, and one-third to the defendant, the court, in mak-

(¹) 1 P. Wms., 446.

ing a decree for partition, recommended to the commissioners that the house and park be allowed to Bligh and his wife, and that a liberal allowance be made out of the rest of the estate to the defendant in lieu of his share of the house and park.

In *Story v. Johnson* (') it was held that where commissioners of partition were directed to divide lands equally between the parties entitled, it was their duty, after dividing the lands into proportions of equal value in the market, to assign them to those parties respectively to whom they would be of more value with reference to their respective situations in relation to the property before the partition took place.

Under the Partition Act, 1868, s. 4, the court is undoubtedly bound in cases where a decree for partition would formerly have been made, if the owner of one moiety requests a sale, to direct a sale of the property "unless it sees good reason to the contrary." The operation of this section has been considered in the cases of *Lys v. Lys* ('); *Pemberton v. Barnes* ('); and *Bowe v. Gray* ('). The Legislature did not mean to lay an absolute rule. It is discretionary with the court, and the reason to the contrary must, no doubt, be a good judicial reason. Here we contend that the reasons against a sale are sufficient, and that a sale ought not to be directed.

[They also referred to *Roughton v. Gibson* ('), *Wilkinson v. Joberns* ('), and *Drinkwater v. Ratcliffe* (').]

Davey, Q.C., and *Ingle Joyce*, for the defendant.

JESSEL, M.R.: Mr. Davey, I will not trouble you, for I am in your favor. First, I will say what I think the law is, because, I am sorry to say, I have not derived that [363 assistance from the authorities which I hoped I should have obtained. The 4th section of the Partition Act undoubtedly effected a change in the law as it existed before, and therefore the prior authorities are of very little use. The section is as follows: "In a suit for partition, where, if this act had not been passed, a decree for partition would have been made, if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the

(1) 1 Y. & C. Ex., 538.

(2) Law Rep., 7 Eq., 126.

(3) Law Rep., 7 Ch., 685.

(4) 5 Ch. D., 262; 22 Eng. R., 70.

(5) 46 L. J. (Ch.), 366.

(6) Law Rep., 16 Eq., 14.

(7) Law Rep., 20 Eq., 528.

parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

Now, therefore, there is an absolute right in the owner of a moiety to require a sale subject to this; unless it sees good reason to the contrary, the court shall direct a sale. In this case the plaintiff has one moiety, and the principal defendant, who has the other moiety, asks for a sale. Therefore he has an absolute right to a sale unless the court sees good reason to the contrary. Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The court must see some good reason why there should not be a sale. I do not say there may not be some other reason from the peculiar nature of the property, but it must be a good reason against the sale.

There are reasons which will strike one at once against a sale. Property may be of a peculiar description so as not to be actually salable, or, at the time the sale is asked for, may be temporarily very much depreciated in value. To give an illustration: If there were two ironworks of equal value, and one party asked for a partition and the other for a sale, and at that time the furnaces were out of blast, it would be obvious that that would not be a good property to sell, and the court would not be able to direct a sale. There are cases where the nature of the property was such that you could not well sell it. There are various properties of such a nature; thus, where the property is so attached to some other property, or such a mere dependence on another property as to be almost valueless except in connection with 364] that property, though *of very great value in connection with it. In that case one of the two owners would say, "Do not sell it, we can partition and divide the property; if you sell, it will fetch a song or nothing," unless some one chose to puff at the sale merely for the purpose of compelling the other owner to bid; but he would not do that at the risk of having the property left on his hands.

To show what I mean: Suppose part of the property was a mere outhouse, or a portion of a room or a portion of a warehouse attached to some other larger property which would have actually no salable value though of a very considerable value to the owner of the house, it seems to me it would be right to say that a sale was not the proper mode. Again, you may have very peculiar rights, which cannot be very properly divided, attached to property—manorial rights, and rights to game and things of that kind, which could not be properly severed from the land or well sold.

All those are objections to the sale, and I think those are the chief objections the court has to consider.

Then the suggestion that the court is to be guided also by the capability, if I may say so, of the property to be partitioned, is not to be forgotten. Where there is some objection to a sale, and, in addition to that, the property can be readily partitioned, of course that does come in aid of what might otherwise be not a sufficient objection to a sale, standing alone. For instance, it might be that the property was not readily salable, but still it could be sold, but then it could be very easily and readily partitioned. In that case I should say that that fact might be prayed in aid of the objection to a sale which might not by itself have prevented the sale, and make the court think there was a sufficient reason shown for there not being a sale. But in all cases the obligation of proof lies on the person who asserts there shall not be a sale, if the persons or person entitled to a moiety request a sale.

That being the position of the case, let us see what the objections are in the present instance. In the first place it is not alleged on either side that the property cannot be sold. It consists of a mansion house, with fifty-eight acres of land lying equally round it, and a few more acres adjoining, and then a larger property lying beyond it in detached pieces of land. Nobody says it cannot be sold. In fact, the best proof that it can be sold is that *the defendant says [365 he will buy it, and is very anxious to buy it. Therefore there is no doubt of the property being salable, and salable at a good price; and I do not see even in the allegations of the plaintiff anything to show it cannot be sold. What he says is, that it is worth more to the owner of a large adjoining property, nearly 1,800 acres, where there is no mansion house, than to anybody else. That may or may not be, and I am not quite so sure of that; but even if it were, that is only an additional reason for the other party to the action requiring a sale because he will make the first man give more. All that is alleged is this, that the owner of this adjoining property of which the plaintiff happens to be tenant for life can, if he likes, damage the view from the window of the mansion house in question.

Whenever you sell property with a sufficient surrounding, as this appears to me to have, it is no answer to say that it is more or less salable because there may be a possibility of your neighbor cutting off some portion of the view. Wherever you buy a house with a view over a surrounding country, you must contemplate that possibility. As far as

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I know, it does not very much affect the selling value of the house. The probability, of course, every purchaser judges of for himself. That is one ground on which it is put.

Then it is said that these other lands surround the house in question, and are intermixed with it. In a sense that is true. They very nearly surround it with the exception of a very small portion, and in one sense that may fairly be said, and it would be very convenient to the owner of those lands, who is a member of the family to which the house once belonged, to have the house, as he has no house in the immediate neighborhood. But is that a sufficient reason for not selling? There is no right in the owner of an estate consisting of any number of acres to have the mansion house on adjoining land partitioned to him; for that is the question. It is not whether if a partition were directed the house should be allotted to him. I cannot say he has any such right as claimed, or that that is a good reason at all.

Then it is said it is part of an old family property, that this is the mansion house of the estate, and there is *pretium affectionis* with which the court ought not to interfere. But 366] it strikes one *at once that if that were so the owner of the estate would never have allowed the mansion house to be severed, because, once having been the owner of the estate and the mansion house, he would have kept them together if he had been so minded. Therefore one cannot consider that you are looking to what I may call the ancestral wishes of the family in dividing the property.

In the next place, the plaintiff is only tenant for life of the settled estate, with remainder to a member of the defendant's family, and the defendant is also a landowner in the county, having lands, some very near this house, others further off, but of considerable value, and he is also anxious to reside in the house, and his lands also come from the same family as the plaintiff's lands, with the exception of a small piece which he has purchased. It does not appear to me that one has more right to talk of *pretium affectionis* than the other. They are both landowners in the county, and as regards the defendant, he is a fee simple owner, and if he buys this mansion house he can certainly annex it to his estate, while the plaintiff is only a tenant for life, with remainder, not to his own children, but to a member of the defendant's family. I will not say he is a stranger, because he is a distant relative, but he is not in a position to annex the house and land to the estate in remainder, but only to join them together during his own life. So that really I cannot say that there is any substantial reason why my

mind should incline to the one side rather than the other. I think those suggestions, if they ought to be considered at all, as to which I entertain very grave doubts, may be very fairly set off one against the other.

Then there is a last consideration, which bears very strongly against the plaintiff. The property cannot be partitioned in the way he suggests. It can be divided in the way he suggests, but the result of dividing it will be that, inasmuch as the mansion house and the fifty-eight acres of land are worth considerably more than the remainder of the property, a sum must be paid for equality of partition. That is stated by the plaintiff himself in his statement of claim, so that there is no dispute about it.

Now, that is a modified sale; it is a sale of part. You have, therefore, a property which avowedly cannot be easily partitioned, because that is not partition pure and simple, but is partition *plus* sale. It appears to me, there- [367 fore, that you have in this case what I have always considered a substantial objection, namely, that you cannot partition the property at all as it stands, to the satisfaction of either party. It appears to me, therefore, that, looking at all the circumstances of the case, I have no good reason to the contrary; and, therefore, that I ought to direct a sale, which I do, either party being at liberty to bid.

Davey, for the defendant, asked for the costs incurred since the 15th of February, 1877, when the defendant offered to submit to an immediate decree for sale.

JESSEL, M.R.: If this had been a frivolous contest I should have made the party who had incurred the unnecessary costs pay the costs, but when there is a fair subject for discussion, and a reasonable ground for asking for the decision of the court, then I think the proper course is to give no costs on either side up to the trial.

Solicitors for plaintiff: *Tylee, Wickham & Moberly*.

Solicitors for defendant: *Gregory, Rowcliffes & Rawle*, agents for C. L. Radcliffe, Plymouth.

[7 Chancery Division, 368.]

V.C.M., Jan. 15, 1878.

368] *SPILLER V. PARIS SKATING RINK COMPANY.

[1877 S. 119.]

Company—Contract—Promoters—Ratification.

A company can ratify a contract which was made by its promoters when the company was not in existence.

Observations on *Melhado v. Porto Alegre, &c., Railway Company* (¹).

THIS was a demurrer raising the question of the power of a company to ratify contracts made by its promoters.

The plaintiff, who was a patentee of roller skates, entered into an agreement dated the 15th of October, 1875, with the Baron de Baillot, the main provisions of which were that the Baron should construct certain skating rinks; that the plaintiff granted to the Baron the exclusive right of using his patent skates at a certain price; that no other skates should be used in the said skating rinks; that the Baron should not have the right of assigning the contract, but might associate himself with other persons under any form for working out the contract.

On the 16th of December, 1875, the defendant company were incorporated under the acts of 1862 and 1867 by the name of the Paris Skating Rink Company, Limited.

The statement of claim alleged that the plaintiff, at the request of the Baron, consented to the transfer to the company of all the rights and obligations of the Baron under the said agreement, and that by virtue of certain arrangements to which the plaintiff was a party, the company soon after their incorporation acquired all the rights of the Baron, and became subject to all the obligations of the Baron, as if the company were parties to the agreement; also that the company and their directors had, by their memorandum and articles, power to enter into and undertake such contracts, arrangements, and obligations as aforesaid. It also alleged that the company had acted upon and derived profits under the agreement.

The plaintiff claimed a declaration that the company had
369] *adopted and were bound by the agreement, and an account of what was due to him under it.

The defendant demurred.

Higgins, Q.C., and Brice, for the demurrer: The plaintiff might have sued for an account *quantum meruit*, but has no rights under this contract, which is not binding on

(¹) Law Rep., 9 C. P., 503; 10 Eng. R., 279.

the company: *Kelner v. Baxter* (¹); *Touche v. Metropolitan Railway Warehousing Company* (²); *In re Hereford and South Wales Wagon, &c., Company* (³). It is not enough for a plaintiff to plead that by virtue of certain arrangements a contract is adopted. The arrangements on which the plaintiff relies must be set out: *Thorp v. Holdsworth* (⁴).

Glasse, Q.C., and *Grosvenor Woods*, for the plaintiff, were not called on.

MALINS, V.C.: The case appears to me of the simplest description. The statement of claim states a contract between an Englishman and a Frenchman; and that this contract was adopted by the defendants, a registered English company. This latter statement the defendant says is a statement of law not supported by a statement of facts, but in my opinion it is a compound statement of law and fact, which is a sufficient pleading of the ratification of the contract.

It is argued that a contract entered into between certain individuals before a company is formed cannot be binding on the company when formed; but here the question is whether such a contract cannot be adopted by the company when formed. To deny this is to argue against a long current of authorities in this court. In *Touche v. Metropolitan Warehousing Company* there was a contract certainly not at first binding on the company, but it was adopted and ratified by the company, and was held by Lord Hatherley to be binding on them. Certain cases at law have been referred to, but *Kelner v. Baxter* has no application; for the only point decided in that case was that the *persons who had made the [370] contract were liable on it, and could not shift the burden over to the company. Great stress was laid on *Melhado v. Porto Allegre, &c., Railway Company* (⁵); but there Lord Coleridge himself says that the decisions at law and in equity are different, and I feel no doubt that that case would have been otherwise decided in equity. Lord Coleridge says that the case of *Touche v. Metropolitan Railway Warehousing Company* (²) rested upon the principle of trustee and *cestui que trust*, but in my opinion it rested on no such principle, but on the power of a company to adopt contracts made by its promoters after its formation. In this case the defendants are alleged by the statement of claim to have ratified and acted upon the contract. The demurrer must be overruled.

Solicitors: *G. S. & H. Brandon; Combe & Wainwright.*

(¹) Law Rep., 2 C. P., 174.

(⁴) 8 Ch. D., 637.

(²) Law Rep., 6 Ch., 671.

(⁵) Law Rep., 9 C. P., 503; 10 Eng. R.,

(³) 2 Ch. D., 621; 17 Eng. R., 644.

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See 15 Eng. Rep., 281 note; 17 Eng. Rep., 649 note; *National Bank v. Vanderwerker*, 74 N. Y., 234.

Where a number of persons not incorporated but associated for a common object, intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he should be compensated; if such

acts were necessary to the organization and its objects, and are accepted by the corporation and the benefits enjoyed, they must be taken *cum onere* and be compensated for.

In such case the promoters of the enterprise must be a majority of them. A minority could not bind the association or corporation: *Bell's Gap R. R. Co. v. Christy*, 79 Penn. St. R., 54.

[7 Chancery Division, 382.]

V.C.H., Nov. 20, 1877.

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*BLANN V. BELL.

Administration Suit—Residue of Real and Personal Estate given to Charities—Marshalling—Payment of Legacies and Costs.

A gift of a share of real and personal residue to a charity having failed except as to pure personality:

Held, that the costs of an administration suit ought nevertheless to be borne by the general estate.

The rule laid down in *Gowan v. Broughton* (1) dissented from.

THOMAS BLANN, who died in 1846, by his will, dated in 1842, after desiring that all his debts, funeral and testamentary expenses should be paid; appointing four trustees; and bequeathing certain pecuniary and specific legacies; gave all the residue of his estate and effects, whether real or personal, to the trustees upon trust to pay the dividends accruing upon the funds specified to certain persons for life, and then gave all the residue of his estate upon trust to pay the annual produce to his wife for life for her separate use, and after her decease gave £10,000 to such persons as his wife should appoint, and, subject to such life estate and power of appointment, gave all the annual produce to his niece, F. Raynor, for life for her separate use, and after the death of his wife and niece, upon trust to divide such residue between the children of the niece, and in case the niece should die without issue who should live to attain the age of twenty-one years, then upon trust to divide among any children of his wife by any future husband the sum of £4,000 when they should attain the age of twenty-one years. In the event of his niece dying without issue, the testator gave other pecuniary legacies, and directed his trustees to divide the residue into two equal moieties, and to hold the same in trust for the Hertford and Bath Infirmaries: *Blann v. Bell* (*).

The testator left both real and personal estate.

(1) Law Rep., 19 Eq., 77; 11 Eng. R., 687.

(*) 2 D. M. & G., 775.

The tenants for life had died without issue, and the cause now came on to be heard upon further consideration.

A master in chancery in his report, made many years ago, stated who were the heir-at-law and next of kin of the testator.

*The Hertford Infirmary could not take a devise [383 of real estate, or a bequest of personal estate savoring of realty; but by an act of Parliament, passed in the nineteenth year of Geo. 3, the Bath Infirmary or Hospital was empowered to take by will and hold lands in mortmain to the extent in value of £1,000 per annum; and by the report of the same master it appeared that the income of the infirmary was at that time less than £500 a year, and it further appeared that the rent and the income from impure personality to be received from this moiety would be less than £500 a year.

W. Pearson, Q.C., and *Quin*, for the plaintiffs, the appointees of the widow of the £10,000.

Dickinson, Q.C., and *Rigby*, for the Hertford Infirmary, referred to *Gainsford v. Dunn* (¹), and to the cases there cited; where it was stated (²) that the result of the cases was that, where you find a legacy followed by a gift of the residue of real and personal estate, the word residue was considered to mean that out of which something given before had been taken, and that was to make the residue a mixed fund, and to charge the legacies proportionally and ratably upon the mixed fund; and they submitted that that course ought to be followed in this case for the benefit of this charity.

Hastings, Q.C., and *Woodroffe*, for the Bath Infirmary, contended that the question as to the annual value of the real estate held by this charity was concluded by the decree in this case in 1852.

Macnaghten, *Crossley*, and *Medd*, for the heir-at-law, next of kin and trustees.

HALL, V.C.: I think that the case of *Gainsford v. Dunn* does not govern this case. The property here has been made one aggregate fund, and I cannot hold that the payment of the debts and legacies ought to be marshalled in favor of the Hertford charity. As to the annual value of the moiety given to the Bath Infirmary, there *having [384 been no suggestion that the annual value has increased, I shall not direct any further inquiry, but act upon the Master's report, and hold that that charity is entitled to a moiety of the real and personal estate.

(¹) Law Rep., 17 Eq., 405; 9 Eng. R., 607.

(²) Law Rep., 17 Eq., 408; 9 Eng. R., 609.

On the question of costs,

Dickinson, Q.C., referred to the case of *Scott v. Cumberland* ⁽¹⁾, and stated that Vice-Chancellor Malins had held that the rule that, in providing for the costs of an administration suit, real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of, applied equally to real estate which descended by reason of lapse and to that as to which no disposition had been attempted; and also to the case of *Gowan v. Broughton* ⁽²⁾ (a suit for the administration of personal estate), where Vice-Chancellor Malins said that the only residue was that given by the testatrix to her niece, which lapsed and was liable to all the expenses and debts; and stated that the Vice-Chancellor said that he decided the same question as to real estate in *Scott v. Cumberland*, and that it would be very inconvenient if there should be one rule as to real and another as to personal estate.

Macnaghten referred to the case of *Trethewy v. Helyar* ⁽³⁾, where the Master of the Rolls held that the costs of a suit for the administration of an estate were payable out of the residue generally, and not primarily out of the lapsed share, and dissented from the *dictum* of Vice-Chancellor Malins in *Gowan v. Broughton*; and guarded himself against being supposed to assent to or dissent from *Scott v. Cumberland*, which had reference to real estate. He also referred to *Williams v. Kershaw* ⁽⁴⁾ and *Seaton on Decrees* ⁽⁵⁾.

Byrne (as *amicus curiæ*) mentioned that Vice-Chancellor Bacon had, in a recent case of *Fenton v. Wills* ⁽⁶⁾, followed the decision of the Master of the Rolls in *Trethewy v. Helyar*.

386] *HALL, V.C.: I am of opinion that the rule of the court is not that stated in the case of *Gowan v. Broughton* ⁽⁷⁾, and therefore I hold that the costs must be paid out of the general estate not specifically bequeathed.

Solicitors: *Senior, Attree & Johnson*, agents for Brydone, Petworth; *J. N. Mason*; *Lambert, Petch & Shakespear*; *Webb, Stock & Burt*; *Maples, Teesdale & Co.*

⁽¹⁾ Law Rep., 18 Eq., 578; 11 Eng. R., 546.

⁽²⁾ 1 Keen, 274 n.

⁽³⁾ Law Rep., 19 Eq., 77; 11 Eng. R., 687.

⁽⁴⁾ 8d ed., vol. i, p. 334.

⁽⁵⁾ 4 Ch. D., 53; 19 Eng. R., 662.

⁽⁶⁾ *Ante*, p. 33.

[7 Chancery Division, 888.]

FRY, J., Dec. 1, 1877.

*ATTORNEY-GENERAL V. TOMLINE.

[388

[1874 A. 124.]

Practice—Consent Judgment—Mistake—Time.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement.

ON the trial of this action judgment was given for the Crown, which was declared entitled to an injunction and to damages for taking coprolites; as reported ⁽¹⁾. Mr. Justice Fry then suggested that the amount of damages might be ascertained by one of the referees, or that he himself might fix the amount. The counsel for the defendant offered to pay half the gross value of the coprolites taken, and this offer was accepted by the Crown. The judgment was not drawn up, passed, and entered until more than a fortnight after it was given, and was as follows, so far as relates to this part of the case:—

“And the defendant, by his counsel, undertaking to pay to the Secretary of State for War half the gross amount realized by the sale of the coprolites got from the said Q Tower land (the amount to be verified by affidavit), this court doth dispense with any account as to damages sustained by reason of the defendant’s trespass thereon.”

The defendant now moved to set aside this part of the judgment as having been consented to under a mistake. It was now stated that the coprolites had not been taken by Colonel Tomline, but had been taken by his licensees under a previous deed, under which he had only received a royalty on them of 12s. per ton, the gross market value being about £2 5s.

Cookson, Q.C., and Phear, in support of the motion: The defendant and his solicitors had forgotten the actual state of things, and did not discover what it was until lately. It is obvious that he would not have consented to pay such a sum unless *he had received the money. No doubt [389 it is not easy to set aside a consent order, but it has been done: *Cooper v. Phibbs* ⁽²⁾. Even if money had been actually paid and a mistake was proved, the court could order it to be repaid.

Hemming, Q.C., and Bigby, for the Crown, were not called upon.

⁽¹⁾ 5 Ch. D., 750; 22 Eng. R., 449.⁽²⁾ Law Rep., 2 H. L., 149.

FRY, J.: This is an application by the defendant to be released from an undertaking given by counsel in court. The action was against Colonel Tomline for trespass. In the view taken by me he was liable to pay damages. I stated what appeared to me to be the measure of the damages, and thereupon his counsel undertook to pay to the Secretary of War one-half of the value of the coprolites taken, and under those circumstances the court dispensed with an account.

It is now said, and I think truly, that the undertaking was given under a mistaken belief as to the facts. The defendant and his counsel believed that the coprolites had been sold by him, but in fact they had been sold only in the sense that he had parted with his interest and was receiving only a royalty as profit. It is to be borne in mind that this fact must have been within the knowledge of the defendant, who was a party to the deed under which he was receiving the royalty, but it was not mentioned during the trial, nor were his counsel aware of it. Now, the judgment was not drawn up until two or three weeks after it was delivered; and the interval between the pronouncing of a judgment by consent and it being drawn up gives an opportunity to a person who has consented to anything to ascertain the true state of facts, and he may in that interval make an application to have the judgment varied. But in my opinion, when a consent order has been drawn up, passed, and entered, it is not competent to this court to vary that order, except for reasons which would enable the court to set aside an agreement.

The facts were within the defendant's own knowledge. There was in the interval between the trial and the drawing up of the judgment ample time to make inquiry. The defendant chose not to make the inquiry, and it would now be unreasonable to allow him to set the judgment aside. I called attention to the cases of applications to rescind contracts to take shares, where it has been held that a person might, after inquiry, refuse to take the shares; so here, after the undertaking was given, inquiry might have been made in time if due diligence had been used, and the application might then have been made. In regulating the proceedings of the court too much indulgence should not be shown to those who have not used due diligence.

I refuse this application with costs.

Solicitor for Crown: *W. T. Perkins.*

Solicitor for defendant: *W. F. Stokes.*

[7 Chancery Division, 419.]

C.J.B., Nov. 12, 1877.

**In re IRVING. Ex parte BRETT.* [419]*Chose in Action—Equitable Assignment—Undertaking to “pay over” Dividends on a Proof—Notice—Bankruptcy Act, 1869, s. 15, subs. 5.*

A., for good consideration, gave B. a written undertaking to “pay over” to him all dividends that he should receive on his proof against a bankrupt’s estate. A. became bankrupt and B. then gave notice of his claim to the trustees in the first bankruptcy:

Held, that there was a good equitable assignment of the dividends, and that B. was entitled as against A.’s trustee in bankruptcy.

THIS was an appeal from a decision of the County Court Judge of Cumberland.

On the 12th of February, 1874, John Irving filed a liquidation *petition. His creditors resolved on liquidation by arrangement, and appointed J. Reddish trustee. [420]

The debtor was jointly indebted with one W. Bushby to the Carlisle Bank on two bills for £500 and £300.

On the 15th of August, 1874, Bushby arranged with the bank to pay them £300 in cash, and give them a new bill for £500, which they undertook not to sue upon in consideration of his proving for the two bills against Irving’s estate and paying them the dividends when received. Accordingly the same day Bushby paid the £300, and wrote the bank as follows: “I hereby undertake that I will, when and as received, pay over to you all dividends coming to me in respect of my proof for £800 upon the estate of Mr. John Irving.”

In reply the bank manager wrote: “I have received your note on demand for £500 dated the 15th instant, and your undertaking to pay over to the bank the dividends on your proof for £800 on the estate of Mr. John Irving as and when received, and on the part of the bank I undertake not to make any claim or demand in respect of the said note unless default is made in the terms of your said undertaking, and to hand over the said note to you when a final dividend has been paid.”

On the 28th of August, 1874, W. Bushby’s proof for £809 9s. 6d. against J. Irving’s estate was admitted.

On the 19th of February, 1876, W. Bushby was adjudicated a bankrupt, and on the 15th of April following H. Brett was appointed trustee of his estate.

On the 31st of March, 1876, the Carlisle Bank gave notice

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to J. Reddish that they claimed the dividends on W. Bushby's proof under the letter of the 15th of August, 1874.

On the 14th of June, 1876, a dividend of 4s. 5½d. was declared on J. Irving's estate.

On the 9th of July, 1877, the County Court Judge ordered J. Reddish to pay over to the Carlisle Bank the dividends on W. Bushby's proof.

H. Brett appealed.

De Gex, Q.C., and *H. Hodgson*, for the appellant: The assignee of a *chose in action* must give notice to the debtor 421] *to perfect his title: *Bradley v. —* ('). Here no notice was given until after the bankruptcy, and more than two years after the alleged assignment.

[BACON, C.J.: Under the old law notice was necessary to take a *chose in action* out of reputed ownership, but since the act of 1869 this is not so.]

The letter constitutes merely a conditional undertaking or promise which was countermandable: *Field v. Megaw* ('); *Malcolm v. Scott* ('); *In re Rawbone's Trusts* (').

Winslow, Q.C., and *Dauney*, for the trustee: The letter of the 15th of August was a good equitable assignment of the dividends: *Rodick v. Gandell* ('); *Riccard v. Prichard* ('). In *Field v. Megaw* they failed to prove any agreement to pay out of a particular fund; so, too, in *Malcolm v. Scott*. *Bradley v. —* is not consistent with later authorities. *In re Rawbone's Trusts* is really not in point; and, if it were, it has been questioned in *Ex parte Ford* (').

[They also referred to *Ex parte Flower* ('); *Fisher on Mortgages* (').]

De Gex, in reply, cited *Fisher on Mortgages* (').

BACON, C.J.: This is a case of the clearest character. The facts agreed upon are these: The bank were the holders of the joint and several promissory notes of two persons for £300 and £500. One of them becomes bankrupt. Under these circumstances the solvent party approaches the bank and offers terms, and they say, If you will pay us £300 in cash, and prove on the two bills and pay us the dividends you receive, we will let you off the payment of the bill for £500. That is the bargain and he agrees to it. The result is that the bank are the only persons interested in the proof. 422] *He makes the proof. It is admitted, and he is entitled to the dividends when they are declared. What is

(') *Ridg. Ca. in Ch.*, 194.
(') *Law Rep.*, 4 C. P., 660.
(') *8 Hare*, 39.
(') *3 K. & J.*, 476.
(') *1 D. M. & G.*, 763.

(') *1 K. & J.*, 277.
(') *1 Ch. D.*, 521.
(') *4 Dea. & Ch.*, 449.
(') *3d ed.*, p. 81.
(') *3d ed.*, p. 82.

that but a *chose in action*? and he binds himself to pay over to the bank those dividends when he receives them. He does not promise, as in the cases that have been cited, that he will pay them out of an uncertain fund, but he undertakes to pay over the very fund itself, and yet it is doubted whether that is an equitable assignment. The letter does not create a charge or lien on the dividends, but it is a good equitable assignment of the entire dividends. The bank gave Bushby the means of making his proof by giving him the bills, and he took them upon his undertaking to pay over the dividends he should receive. If he had refused to hand over the dividends to the bank they could without doubt have compelled him to perform his undertaking. In my opinion, therefore, there is no ground for saying that the bank are not entitled to this dividend. It is clear that Bushby, at the time of his bankruptcy, was entitled to this *chose in action*, but it was subject to a trust to hand it over to the bank when received. No question of order and disposition, therefore, arises, that being disposed of by sect. 15 of the act of 1869, and the case is simply this, that Bushby was the assignor to, and at the same time the trustee for, the bank of these dividends. In my opinion, therefore, the order appealed against is right, and is consistent with all the authorities. The appeal must be dismissed with costs.

Solicitor for appellant: *W. J. Foster.*

Solicitor for respondent: *C. Bendle.*

[7 Chancery Division, 423.]

C.A., Dec. 6, 7, 1877.

*WIDGERY V. TEPPER.

[423

[1874 W. 90.]

Wife's Chose in Action—Sale by Husband—Reduction into Possession—Right to set aside Sale—Decree in former Suit—Bill of Review.

W., being entitled in right of his wife to a share of certain engravings which were in the hands of T. as agent for the parties entitled, sold his wife's share to T., subject to a stipulation that six engravings should be delivered to him in specie. He received the purchase-money, but the six engravings were not delivered. The owners of other shares made similar sales to T. W. died in the lifetime of his wife. The engravings remained in T.'s possession till his death, and were sold in a suit for the administration of his estate. W.'s executors after this filed a bill to set aside the sale of Mrs. W.'s share as obtained by fraud:

Held (affirming the decision of Malins, V.C.), that W.'s executors, and not the executors of the surviving wife, were the proper persons to sue.

In the administration suit an inquiry was directed what interest T. had at his death in the engravings in question, and if interested as owner, to what extent, and whether he became such owner as trustee, legatee, purchaser, or otherwise. In an-

answer to the inquiry it was found that T. became entitled as purchaser, subject to the delivery of six of the engravings to each of the vendors, and that such delivery had been made under an order in the suit. W.'s executors were parties to these proceedings in respect of their right to the six engravings. An order on further consideration was made treating T. as owner, which was afterwards enrolled. The question of fraud had not been raised:

Held (affirming the decision of Malins, V.C.), that this decree did not interfere with a bill to set aside the sale for fraud.

THIS was a suit by the personal representatives of John Widgery to set aside a sale by him of a share to which his wife had been entitled as one of the five next of kin of J. M. W. Turner, R.A., in certain engravings.

By a decree made in 1856 it was declared that the engravings in question belonged as to one-fifth to J. Widgery and M. A. Turner, his wife, in her right, and as to the other four-fifths to the four other next of kin in equal shares, and it was ordered that they should be delivered to Jabez Tepper on behalf of the next of kin, he being one of such next of kin and acting as the solicitor in the suit for the others. The engravings were delivered to him accordingly.

In January, 1858, Jabez Tepper proposed to the persons 424] entitled *to the other four shares in the above engravings, to purchase their shares, the price of each share to be £500, in addition to which the vendor of each share was to have six of the engravings. Three of the next of kin, including Widgery and his wife, accepted the offer and received the prices of their shares, but the six engravings to each were not delivered. The persons entitled to the remaining fourth share declined to accept the offer. The engravings remained in the possession of Jabez Tepper till his death, which took place in 1872.

Widgery died in 1861. His wife survived him, and died in 1871.

In January, 1872, a creditor's suit, *Turner v. Turner*, was commenced for the administration of the estate of Jabez Tepper, and in the same month a decree was made for administration, which contained an inquiry of what Jabez Tepper's estate consisted, and an inquiry whether his estate was subject to any liability to the parties interested in the estate of J. M. W. Turner, in respect of his occupation of a leasehold house of Turner's and the engravings or property therein. The engravings thus referred to were the engravings in question. On the 18th of June, 1872, an inquiry was added, what interest Jabez Tepper had in the engravings, &c., in his possession at the time of his decease, formerly part of the estate of J. M. W. Turner, and, if interested as owner, to what extent, and whether he became such owner

as trustee, or legatee, or purchaser, or otherwise, and who were then the persons interested therein. The decree was served on Widgery's executors as interested in respect of the six engravings, which were of considerable value.

On the 9th of August, 1872, an order was made in *Turner v. Turner*, at the making of which Widgery's executors were represented, by which it was, among other things, ordered that six engravings, to be selected by the Chief Clerk from among the above engravings, should be delivered to Widgery's executors in satisfaction of all claim by them for non-delivery of six engravings in part payment for the share of Widgery in right of his wife in the engravings sold to Jabez Tepper. Early in 1873 the plaintiffs received the six engravings accordingly, and gave a receipt for them.

On the 20th of February, 1873, the Chief Clerk made his *certificate in *Turner v. Turner*, whereby he certi- [425 fied that Jabez Tepper was at his death entitled to the engravings; as to four-fifths thereof beneficially, subject to the delivery of six engravings to each of the next of kin who had sold their shares, and as to the remaining fifth, as a trustee for the representatives of that one of the next of kin whose share had not been sold; and he proceeded to certify further that the six engravings had since been delivered.

On the 8th of March, 1873, the cause of *Turner v. Turner* came on for further consideration, Widgery's executors appearing, and an order was made declaring Samuel Tepper entitled to the whole of the personal estate of Jabez Tepper, and authorizing a sale of the engravings.

The above orders were enrolled.

The engravings were sold accordingly at different times from March, 1873, to March, 1874, and realized a gross amount of £35,862. In April, 1874, the bill in this cause was filed to impeach the sale to Samuel Tepper as regarded Mrs. Widgery's share.

The defendants, by their answers, insisted, among other things, that as the wife had survived the husband, her representatives, and not his, were the proper parties to impeach the sale, and that even if the plaintiffs had a *locus standi*, the enrolled orders in *Turner v. Turner* debarred them from relief. Vice-Chancellor Malins overruled these objections, and made a decree in favor of the plaintiffs ('). From this decree Tepper's executors and Mrs. Widgery's executors appealed.

Glasse, Q.C., and Bristowe, Q.C., C. H. Turner, and T. A. Roberts, for the appellants, on the question as to the

(') 5 Ch. D., 516.

locus standi of the plaintiffs, cited, in addition to the authorities referred to below, *Harwood v. Fisher* ⁽¹⁾.

J. Pearson, Q.C., and W. Karslake, for the respondents, were not called upon.

JAMES, L.J.: In my judgment this is a clear case. Cer- 426] tain chattels were *delivered to Tepper on behalf of himself and the other next of kin, of whom Mrs. Widgery was one. Mr. Widgery sells to Tepper his wife's share of them, and receives the purchase-money. If reduction into possession of chattels of this kind is necessary, there was here a clear reduction into possession.

BAGGALLAY, L.J.: I am of the same opinion, and entirely concur in the reasons given by the Vice-Chancellor in his judgment.

THESIGER, L.J., concurred.

Argument resumed.

The question as to the title to these engravings was put in issue in proceedings to which the present plaintiffs were parties, and the orders establishing the title of Jabez Tepper have been enrolled.

[JAMES, L.J.: How can an inquiry in an administration suit what a man's property consisted of interfere with a bill alleging that part of that property was obtained by fraud?]

There is a direct decree *in rem* properly pleadable.

[JAMES, L.J.: Was there any judicial determination in *Turner v. Turner* upon the question of fraud?]

The contract was in issue.

[BAGGALLAY, L.J.: For the purpose of this objection we must consider that fraud was discovered after the decree.]

Then a bill of review is necessary.

J. Pearson, Q.C., and W. Karslake, for the plaintiffs, were not called upon.

JAMES, L.J.: In my opinion there is nothing in the objection. The two suits were totally different in their nature and object. In the first suit an inquiry was directed as to the ownership of the property, and in answer to that inquiry 427] it was found that Tepper was owner of it *by purchase. So long as the purchase was not impeached he was so, and the validity of the purchase never having been in issue in that suit, a decree treating him as so entitled does not interfere with any right to set the purchase aside as brought about by fraud.

BAGGALLAY, L.J.: I am of the same opinion. *Turner v. Turner* was a suit simply for the purpose of ascertaining what property Tepper had applicable to payment of his

(1) 1 Y. & C. Ex., 110.

debts, and to have it applied in paying them. At that time the present plaintiffs, who had been served with notice of the decree and attended the proceedings, were ignorant of their rights, and not in a position to raise the present questions. If further proceedings had to be taken in *Turner v. Turner* for the purpose of getting the benefit of the decree in this suit (assuming it to be affirmed), then it would be necessary to take proceedings in the nature of a bill of review.

THESIGER, L.J.: I cannot find that this matter was in issue in the former suit. The inquiry was not directed to the question of fraud, but only to the extent of Tepper's interest in the property, and how he acquired it, whether as trustee, legatee, or purchaser. The present suit proceeds entirely on the ground of fraud, which was not before the court in the other suit.

The argument then proceeded on the merits, and in the result the appeal was dismissed with costs.

Solicitors: *Whitakers & Woolbert; J. Turner & Son; Guscotte, Wadham & Daw.*

[7 Chancery Division, 428.]

C.A., Dec. 17, 1877.

*EVERETT V. EVERETT.

[428

[1874 E. 38.]

Wills Act (1 Vict. c. 26), s. 24—*Will speaking from Death—Release of all Debts due to Testator.*

A testator, after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator:

By a codicil the testator released the son from another specified debt for moneys misappropriated by the son:

Held (reversing the decision of Malins, V.C.), that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by the testator between the date of his codicil and of his death.

THIS was an appeal from a decision of Vice-Chancellor Malins (*).

William Everett, by his will, dated the 22d of March, 1872, disposed of considerable property for the benefit of his two sons and two daughters and the widow and children of

(*) 6 Ch. D., 122; 22 Eng. R., 691.

a deceased son; and among other things he gave all his interest as mortgagee in a leasehold messuage and premises situate in Piccadilly, and in the mortgage debt and interest secured to him thereon, to trustees in trust for his son Frederick Everett for life, and after his death for the benefit of his wife and children. The will then contained the following clauses: "Whereas by a certain mortgage or conditional bill of sale bearing date, &c., certain paintings, goods, and chattels were assigned to me by the said Frederick Everett to secure the repayment of £800 in manner therein mentioned; and whereas by a certain memorandum of deposit bearing date, &c., the said Frederick Everett deposited with me a certain policy of insurance effected on his life in the Alliance Assurance Company as a security for the payment to me of any sums of money which I may pay or in any manner render myself liable to pay on behalf of my said son not exceeding £300; and whereas, by a certain memorandum *of deposit, my said son deposited with me two several bonds of one Henry Elton to secure a certain sum of money lent and advanced by me to him; and whereas I have since caused such bonds to be cancelled; and whereas I have lent and advanced unto my said son various other sums of money, and he is now indebted to me in divers sums of money in respect thereof; and whereas I am desirous that he, his executors and administrators, shall be discharged and relieved from the said several hereinbefore mentioned sums of money, and that neither he nor they should be required to pay the same, or any part thereof, to my said estate, and that the several securities now held by me in respect of the said several last-mentioned moneys should be restored and given up to him, or in the event of his dying before me, then to his executors or administrators for the benefit of his estate, as hereinafter mentioned; Now I do hereby give and bequeath unto my said son Frederick, and if he should predecease me, then to his executors or administrators for the benefit of his estate, all and several the aforesaid several moneys, together with the several paintings, policy, bonds, goods, and chattels, and all other effects now in my custody, possession, or power relating thereto." And after giving directions that the debt due from H. Elton on the said bonds should not be enforced, the testator continued: "And I release my said son, his executors and administrators, from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects, and all other moneys due from him to me; and I desire my executors to do and execute all acts and deeds (if any) which

may be necessary or proper for confirming and effectuating such release."

The testator made a codicil to his will, dated the 26th of September, 1873, in which, after reciting that his son Frederick had improperly received and applied to his own use certain moneys or the proceeds of securities held by him, amounting to £7,600 or thereabouts, the testator revoked certain of the bequests to his said son contained in his will, and, among others, of the bequest of all his interest as mortgagee in the leasehold messuage and premises in Piccadilly, which he directed should go into his residuary estate, and then proceeded as follows: "I direct that the several securities held by me in respect of the said sum of £7,600 shall be delivered up to my said son, or if he shall predecease me, to his executors or administrators, to be [430 cancelled, and I release him from all claims and demands in respect thereof, and also of all moneys advanced on mortgage of the premises in Piccadilly, and I desire my executors to do and execute all such acts and deeds (if any) which may be necessary or proper for confirming and effectuating such release in the manner provided for in the last sheet of my aforesaid will." And the testator in all other respects confirmed his said will.

The house in Piccadilly was originally the property of Frederick Everett, who had mortgaged it to his father to secure an advance by him before the date of the will; but before the date of the codicil the testator had purchased the equity of redemption of the house.

After the date of the codicil the testator made further advances to his son of £200 and £150, which were due at the time of the death of the testator.

The testator died in May, 1874. The present suit having been instituted for the administration of his estate, the question arose whether those subsequent advances were intended by the testator to be released.

The Vice-Chancellor held that the will must be taken for this purpose to speak from the date of its execution, and that the subsequent advances were not released.

Frederick Everett appealed from this decision:

Karslake, Q.C., and *Whitaker*, for the appellant: The 24th section of the Wills Act (1 Vict. c. 26) enacts that a will shall be construed as to the real and personal estate comprised in it as if it were executed immediately before the death of the testator, unless a contrary intention shall appear by the will. The debts of the testator formed part of his personal estate; therefore the only question is, whether

any contrary intention appears by the will. No such expression of intention has been pointed out; on the contrary, the words of the will seem expressly to refer to future debts. For the words "the aforesaid moneys, goods, chattels, and effects" comprehend all debts then due, and the securities for them, whether specially mentioned or alluded to under the expression "various other sums of money" which the testator says he has advanced; and the further 431] words by "which the testator releases, "all other moneys due from him to me," have no meaning unless they include debts subsequently contracted: *Wagstaff v. Wagstaff* ('); *Castle v. Fox* ('); *Goodlad v. Burnett* ('); *Lady Langdale v. Briggs* (').

[JAMES, L.J., referred to an unreported case of *York v. Brown*, in which the testator, John Neal, devised "all his messuages, farms, lands, and hereditaments situate in the parish of Great Bowden," and afterwards purchased other land in the same parish. By the decree in that suit, made on the 11th of June, 1844, it was declared that the after-purchased estate passed under the devise.]

Glasse, Q.C., and *Nalder*, for the executors: There is a clear indication in the will and codicils that the testator did not mean to release debts incurred after the date of his will. The testator had four children besides the children of a deceased son, and he carefully divided his estate between them, and in so doing took into account the sums then owed by his son Frederick. Can it be supposed that he intended to include all advances which he might afterwards make, to any amount, which might entirely disarrange the scheme of division? Moreover, we find that in the codicil, after his son had become indebted to him in a further sum, he especially releases him from it, and also released him from the mortgage debt on the house in Piccadilly, showing that he did not understand that the general release in his will would be sufficient for this purpose. *Douglas v. Douglas* (') is directly in point. Other authorities in our favor are *Smallman v. Gooldin* ('); *Cole v. Scott* ('); *Bothamley v. Shereson* ('), and *Sidney v. Sidney* (').

J. Pearson, Q.C., and *Hunter*, for the residuary legatees.

JAMES, L.J.: I regret that I cannot arrive at the same conclusion with the Vice-Chancellor in this case.

432] *The words of the statute are quite plain: "Every

(1) Law Rep., 8 Eq., 229.

(2) Law Rep., 11 Eq., 542.

(3) 1 K. & J., 341.

(4) 8 D. M. & G., 391.

(5) Kay, 400.

(6) 1 Cox, 329.

(7) 1 Mac. & G., 518.

(8) Law Rep., 20 Eq., 304; 13 Eng. R., 814.

(9) Law Rep., 17 Eq., 65; 7 Eng. R., 681.

will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will." Here the words of the will are: "I release my said son, his executors and administrators, from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects, and all other moneys due from him to me." There is no doubt that the testator's debts were part of his personal property comprised in the will, and the gift is generic; so that *prima facie* the will operates from the testator's death. Therefore the only question is, What is there in the will to show a contrary intention?

Now, it is said that a contrary intention may be shown in the will by taking into consideration the surrounding circumstances. The testator had several children, and it is argued that he was distributing his property among them, that it must be presumed that in making this distribution he would have regard to the debts that were due to him from his son at the time, and that we cannot suppose that he would take into account what might become due to him afterwards, for that would entirely alter the distribution of the property. But to my mind that consideration is far too wide and remote a speculation, and would be merely a guess at the intention of the testator. With respect to the case of *Smallman v. Goolden* (¹), in which Sir Lloyd Kenyon held that a gift to the testator's son of "all sums of money due to me from him on bond or any other security" must be confined to debts due at the date of the will, it must be remembered that the decision was before the Wills Act, and there was no distinct enactment, as there is now, that a will must be construed, as to the property comprised in it, as speaking from the death of the testator, unless a contrary intention appears by the will. In the present case, so far from there being any expression of a contrary intention, the words seem to me to indicate an intention to release future advances. The testator releases all claims in respect of the "aforesaid moneys," that is to say, the debts on bond and other securities which he specially mentions, and also the various other sums *which he says he had advanced [433 to his son, and as to which he says "he is now indebted to me in divers sums in respect thereof." Assuming that the word "now" in that clause must be limited to the date of the will, there is the further clause in the release, "and all moneys due from him to me." He does not say "now due,"

(¹) 1 Cox, 329.

and that clause can have no meaning unless it can have the meaning which the act gives it by making it speak from the death of the testator.

Then it is said that the codicil shows that this interpretation cannot be put on the will, because in the codicil the testator specially releases a certain debt subsequently contracted. But when we look at the codicil we see that this debt was not for money advanced by the testator, but for money improperly appropriated by the son, and he may well have thought that such a debt would not be included in the release contained in the will of moneys due to him, and therefore considered it right specially to mention it. The other matter referred to in the codicil is the mortgage on the house in Piccadilly, which had been given by the will, not to the son alone, but to his wife and children, and the testator, therefore, thought it necessary specially to notice that debt. On the whole, I feel bound to say that I cannot see any sufficient expression of intention to take the case out of the statute. The decision of the Vice-Chancellor must, therefore, be reversed.

COTTON, L.J.: I also am unable to agree with the decision of the Vice-Chancellor. It is a pure question of construction. There is no doubt that a release of debts is a gift of personal estate within the meaning of the 24th section of the Wills Act. If so, the words releasing the debts are *prima facie* quite sufficient under the statute to include all debts due at the death of the testator, and the only question is whether a contrary intention appears by the will. I think we ought not to fritter away the effect of the statute by catching at doubtful expressions for the purpose of taking the case out of the operation of the statute. Mr. Glasse contended that in construing the will you must look at the surrounding circumstances to ascertain the intention of the [434] testator. I agree that you must know *the subject matter of the gift and the circumstances with which the testator is dealing; but it is said that you must also take into consideration that the testator was a father who was making his will and distributing his property among his children. By this argument, in effect, we are asked not to rely upon the language of the testator as supplying a dictionary or interpretation to his own meaning, but to introduce a presumption of what his meaning was likely to be. We are asked not to look in the will for the expression of a contrary intention, but to conjecture what the intention of a father distributing his property among his children ought to be.

Two other matters were referred to, namely, the release of

the two debts in the codicil. But one of those debts was in respect of money improperly obtained by the son, and the testator may have well thought that the general release of debts in the will would be held to be confined to debts of a like nature to those before mentioned, and would not include a liability in respect of moneys improperly obtained; and as to the mortgage debt, the reference to it is explained by the special circumstances of that security, which might induce the testator specially to refer to it.

THESIGER, L.J.: I am of the same opinion. I will confine myself to a consideration of the words used in the will. The testator first recites the existence of certain mortgages and bonds and specified sums in respect of which money was due to him from his son; so far he is speaking only of what was due at the date of the will. Then he says that other sums were then due to him from his son, still speaking from the date of the will. Then we come to the bequeathing part, and it is argued that the bequest should not be carried further than the extent indicated by the recitals. No doubt that is an element of consideration, but at the same time we must give effect to all the words of the will, and also to the enactment of the statute. The testator says, "I give and bequeath to my said son Frederick Everett all and every the aforesaid several moneys, together with the several paintings, &c., now in my custody, possession, or power relating thereto." It is clear from these words that "the aforesaid several moneys" apply not only to the advances [435 specifically mentioned, but to the other sums in respect of which the son is mentioned as "now indebted" to his father. This throws light on the subsequent words, "I release my said son from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects," that is, all the debts referred to in the recitals; and when he proceeds to say, "and all other moneys due from him to me," we should not be giving effect to the words if we were to read them as including only debts existing at the date of the will, and did not extend them to include debts which might afterwards become due.

Solicitors: *Collyer-Bristow, Withers & Russell; H. R. Poole.*

See 1 Redfield on Wills (4th ed.), 378-388; 1 Jarman on Wills (Randolph & Talcott's ed.), 591 *et seq.*

The section of the English statute referred to (1 Vict., ch. 26, § 24) is as follows: "And be it further enacted that every will shall be construed, with

reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Under this statute it has been held,

where the testator devised his "Cleeve Court estate," that additions to the "Cleeve Court estate," made by the testator after the will, passed to the devisee: *Castle v. Fox*, L. R., 11 Eq., 542, 552-5.

See also cases cited, 1 Redf. on Wills (4th ed.), 380, note 4.

In New York, by statute (2 R. S., 57, § 5, marg. p., 3 R. S., 58 (6th ed.), § 7), "Every will that shall be made by a testator, in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death."

It has been held that a will executed before the Revised Statutes of 1830 were passed, devising all the testator's real estate, though the testator died after those statutes took effect, disposes only of such real estate as the testator had at the time of the execution of the will; and that subsequently acquired lands do not pass by it. In this respect the effect of wills executed before the passage of the Revised Statutes, is not touched by those statutes: *Parker v. Bogardus*, 5 N. Y., 309.

It has been held, in New York, that, at common law, a will of personal property spoke as of the time of the death of the testator and a devise of real estate from the date of the devise, and that the effect of this provision of the Revised Statutes was to do away with the distinction between real and personal estate: *McNaughton v. McNaughton*, 41 Barb., 50, affirmed 34 N. Y., 201; *Lynes v. Townsend*, 33 N. Y., 558, 563.

See also *Quinn v. Hardenbrook*, 54 N. Y., 88-90.

In that state the doctrine is firmly established, that in a will of personal estate the testator is presumed to speak with reference to the time of his death: *Lynes v. Townsend*, 33 N. Y., 564; *Van Vechten v. Van Veghten*, 8 Paige, 104; *Van Alstyne v. Van Alstyne*, 28 N. Y., 377.

Where the testator by his will released his son P. E. "from any charge that I have made," held, that the words showed an intention on the part of the testator to limit the release to charges existing at the time when the will was executed. But that a codicil amounted to a republication of the whole will not

revoked by the codicil, and must be held to speak in regard to the release of charges, as of the time of the execution of the codicil. Held also, that the words of the will, releasing the testator's children from "any charge I have made against them or either of them," could not be held applicable to promissory notes, so as to release the notes of P. E. held by the testator: *Van Alstyne v. Van Alstyne*, 28 N. Y., 375.

See also *Quinn v. Hardenbrook*, 54 N. Y., 83.

As to the effect of republication, see *Johnson v. Johnson*, 1 Tenn. Chy., 623; *Perkins v. Mickelthwaite*, 1 P. Wms., 275.

The courts of England have, however, held, under the English statute, that a devise of the lands "I have," meant the lands "I have at the time of my death." *Doe v. Walker*, 12 Mees. & Welsb., 591; *Castle v. Fox*, L. R., 11 Eq., 553, and cases cited.

A devise by a husband to his "dear wife," not mentioning her name, applies exclusively to the individual who answers the description at the date of the will, and not to an aftertaken wife: *Johnson v. Johnson*, 1 Tenn. Chy., 621, disapproving Mr. Redfield's assertion to the contrary (1 Redfield on Wills, (4th ed.), 383-4).

See 1 Redf. on Wills (4th ed.), 275, 384, marg. p., note 4, where the testator has no wife at the making of such a will.

Though where the testator had a legal wife Elizabeth, and was living with a woman named Sarah, a bequest to my "wife Sarah" goes to the latter: *Dilley v. Matthews*, 8 Law Times Rep., N.S., 762.

As to what is an advancement, see 22 Eng. Rep., 696 note; *Miller v. Blase*, 30 Gratt. (Va.), 744; *Jennings v. Shacklett*, 30 Gratt. (Va.), 765; *Harness v. Harness*, 63 Ind., 1; *Warren v. Durfee*, 126 Mass., 338.

Where advancements are shown to have been made by an ancestor in his lifetime to his children, of unequal values, on bill for partition of real estate inherited from such ancestor, it is proper for the court first to find the value of each advancement, and require the same to be brought into hotchpot.

The date of an advancement is the time when, in fact, it was made and

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possession taken under it, and not the date of the deed made subsequent thereto conveying the property, which is but the fulfilment of the ancestor's bounty, and relates back to the time when the gifts were in fact made, and its value should be estimated from the time possession was taken by the donee: *Pigg v. Carroll*, 89 Ills., 205.

One of the essential elements of an advancement is, that it must be something taken by the parent out of his own estate and given to the child, or something purchased and paid for by the parent for the child. Where an intestate purchased and paid for a policy of insurance on his own life in the name of his daughter and for her sole benefit, and paid the annual premiums

thereon until his death. Held, that such policy, and also the annual payments of premiums after its purchase, were advancements to the daughter.

Where a policy of insurance, purchased and paid for by a father in the name of his daughter, is charged as an advancement to her, its value must be estimated at the time of the father's death, relation being had to its situation at the time of the gift, that is to say, at the time it was issued. Subsequent annual payments of premiums made by the father held to be advancements of so much money to be charged, without interest, during the father's lifetime: *Rickenbacker v. Zimmerman*, 10 S. C. Rep., N.S., 110.

[7 Chancery Division, 453.]

V.C.H., May 5, 7: C.A., Dec. 5, 19, 1877.

*ALLEN V. BEWSEY.

[453]

[1875 A. 57.]

Copyhold—Tenure for Life with Power to nominate Successor—Devise of Legal Estates to Trustees—Equitable Limitations of Inheritance.

By the custom of the manors of Y., P., and S., the tenant of a copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees to the use of his grandson A. for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of A. and their heirs as tenants in common, with remainder to the use of the plaintiffs. By a codicil the testator, after reciting that he had ascertained that his "said copyhold estates" were held of the manors of P. and S., directed that "all his said copyhold estates within the manor of P. and S." should be held by his said trustees to the uses and upon the trusts in his said will declared, if and so far as the customs of the said respective manors would warrant or authorize; and if the custom of the said manors or either of them did not warrant or authorize the entail created by his said will, then and in that case his said grandson A. and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the said manors. A. was admitted tenant for his life, and nominated the defendant as his successor, who was admitted accordingly. On a bill filed by the plaintiffs to carry into effect the trusts of his will:

Held, first, that the trustees took the legal estate in the copyholds held of [454] the manor of Y., and ought to have been admitted instead of A., and that all the beneficial limitations in the will were equitable interests. Secondly, that the codicil had no reference to the copyholds held of the manor of Y.; and that even if it did refer to them, it did not revoke the equitable limitations of the will. Thirdly, that although by the custom of the manor the tenements were only held for life with power of nominating a successor, the testator had power to dispose of the equitable inheritance by giving successive equitable interests.

The decision of Hall, V.C., affirmed.

[7 Chancery Division, 495.]

C.A., Jan. 15, 1878.

495]

*FAITHFULL V. EWEN.

[1874 F. 68.]

Lien of Solicitor—Charging Order—Mortgage by Clients—Priority—Solicitors Act
(23 & 24 Vict. c. 127), s. 28.

The plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the defendants. This mortgage was sent to the solicitor of the plaintiffs for his perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the plaintiffs' solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under 23 & 24 Vict. c. 127, s. 28, on the interests of the plaintiffs:

Held, by the Master of the Rolls, that the charge ought to be postponed to the mortgage to the defendants.

Held, on appeal, that as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment.

THIS was an appeal against an order of the Master of the Rolls, made in the suit of *Faithfull v. Ewen* and in the matter of the statute 23 & 24 Vict. c. 127, whereby he declared that Mr. Brook, who had acted as the solicitor of the plaintiffs in the suit, was entitled to a charge upon the shares and interests of the plaintiffs in the property recovered and preserved, or to be recovered and preserved, by the proceedings in the suit for the amount of his taxed bill of costs and charges and expenses as such solicitor, but that such charge was to be subject to an indenture dated the 1st 496] of *September, 1876, and to the charge thereby created in favor of the defendants Ewen and Clark.

No question was raised on the appeal as to the propriety of the order so far as it created a charge in favor of Mr. Brook, but he appealed against so much of the order as declared his charge to be subject to the charge of the defendants Ewen and Clark.

The defendants Ewen and Clark were the trustees of the will of Robert Faithfull; the plaintiffs and the defendant Caroline Hills Lucy Gravins were the daughters and only children of the testator, and the defendant Sarah Maxwell Webb was his widow. She had, after his death, married William Webb, who died before the institution of the suit.

By his will, dated the 13th of November, 1833, the testator gave his residuary estate in trust to pay the income to his widow during her life if she should so long continue his widow, and in case she should marry again, then to pay to her one moiety only of the income, and after decease or

second marriage, but in case of her second marriage, subject to her life interest in one moiety of the income, upon trust to divide his residuary estate equally between his children, the share of each daughter to be held in trust to pay the income to her during her life for her separate use without power of anticipation, and after her decease in trust to pay the same as she should by will appoint, and in default of appointment in trust for her executors or administrators, according to the Statute of Distributions in case she had died intestate.

By the bill in the suit of *Faithfull v. Ewen*, filed in 1874, it was sought to charge the defendants Ewen and Clark with a sum of £14,302 3s. 11d. alleged to have been improperly dealt with by them in the course of the administration of the testator's estate; and by the decree made on the 24th of November, 1875, amongst other directions and inquiries, an inquiry was directed how the said sum had been invested or applied or disposed of.

The indenture of the 1st of September, 1876, mentioned in the order appealed from, was made between the defendant Sarah Maxwell Webb of the first part, the plaintiffs of the second part, and the defendants Ewen and Clark of the third part. It contained recitals to the effect, amongst other things, that the defendants Ewen and Clark had advanced to the plaintiffs and the *defendant Sarah Maxwell [497 Webb, or some or one of them, moneys to the amount in the aggregate of £8,303 5s. 5d., being parts of the sum of £14,302 3s. 11d. which was sought to be recovered in the suit, and that in making such advances the defendants Ewen and Clark had committed breaches of trust in respect whereof they might be called upon to make good the said capital sum of £8,303 5s. 5d. and the income thereof, and by the said indenture the plaintiffs and the defendant Sarah M. Webb, in consideration of the premises and of the sum of £1,200 then advanced to them by the defendants Ewen and Clark out of their own moneys, jointly and severally covenanted with the defendants Ewen and Clark for the repayment to them of the said sum of £1,200, and also of all such sums as they might pay in replacement of the £8,303 5s. 5d., with interest upon such several sums respectively, and for the indemnity of the defendants Ewen and Clark in respect of the breaches of trust so committed by them; and the defendant Sarah M. Webb and the plaintiffs charged their beneficial interests under the will of the said Robert Faithfull with the performance of the covenants so entered into by them.

It appeared that the negotiations for the loan of £1,200 were conducted by Mr. Nokes, the solicitor of Mrs. Webb, and Messrs. Beaumont & Warren, the solicitors of the trustees; and that Mr. Nokes, having received from Messrs. Beaumont & Warren the draft of the proposed mortgage and indemnity, forwarded it to Mr. Brook for approval on behalf of the plaintiffs. Mr. Brook was not present when the deed was executed by his clients, the plaintiffs; but upon the evidence the court held that he must be considered to have been aware of the intention of all parties to execute the deed and to have sanctioned the execution of it by the plaintiffs. On the petition of Mr. Brook the order under appeal was made, and on the same day, by the order on further consideration, the life interests of the plaintiffs and Mrs. Webb were impounded to make good the sums received by them out of the trust funds.

Chitty, Q.C., and *Caldecott*, for Brook: There is no reason for postponing the solicitor's charge. A person who knows of the suit has notice that costs must have been 489] *incurred: *In re Fiddey* (¹); *Haymes v. Cooper* (²). The mortgagees therefore should have asked whether the costs had been paid, and whether Mr. Brook intended to forego his claim. *In re Snell* (³) is entirely different; the same solicitor was acting for mortgagor and mortgagee, and the case rested on the duty he owed to the mortgagee. Moreover, the case was not one of a charge under the act. *Hicks v. Keate* (⁴), a case before the act, illustrates the same principle.

Davey, Q.C., and *G. B. Edwards*, for the trustees: We contend that a solicitor who settles a mortgage on behalf of his clients cannot afterwards set up a lien of his own against it. At the time when the mortgage was made Brook had no charge. *Morse v. Cooke* (⁵) offers an analogy in our favor.

Bond Coxe, for Mrs. Webb and the plaintiffs.

Caldecott, in reply.

1878. Jan. 15. The judgment of the Court (James, Baggallay, and Thesiger, L.J.J.) was now delivered by

BAGGALLAY, L.J., who, after stating the facts as above, continued: It is insisted, on behalf of the respondents, that inasmuch as Mr. Brook was cognisant of the arrangement under which the defendants Ewen and Clark were about to advance their money, and did not in any way assert his rights under the statute though he had every opportunity

(¹) Law Rep., 7 Ch., 773; 3 Eng. R., 622.

(²) 33 Beav., 431.

(³) 6 Ch. D., 105; 22 Eng. R., 485, 677.

(⁴) 3 Jur., 1024.

(⁵) 13 Price, 473.

of doing so, he must be treated as having waived them in favor of the defendants.

We are unable to adopt this view. The defendants Ewen and Clark and their advisers were of course aware of the pending suit, and they must have known, or must be presumed to have known, the rights which the solicitor of the plaintiffs was entitled to under the statute. If they desired that the defendants should have a charge paramount to Mr. Brook's statutory charge for costs, *they should have [499 inquired of him whether his costs had been paid, or, if they had not, whether he was willing to forego his rights in their favor. No consideration was given to Mr. Brook for any such waiver, no question was asked him; he misstated nothing, he concealed nothing; no one can be heard effectually to say that he was misled by him.

When the matter was before the Master of the Rolls the question chiefly in dispute, so far as we can judge from the shorthand notes of his judgment, appears to have been whether Mr. Brook was entitled to a charging order; and the question whether, assuming him to be so entitled, the charge in his favor should be made subject to the charge created in favor of the defendants by the indenture of the 1st of September, 1876, does not appear to have been much discussed.

However this may be, we are of the opinion that the order of the 9th of July, 1877, should be varied by omitting the declaration of the priority of the charge created by the indenture of the 1st of September, 1876.

Mr. Brook and the defendants must be at liberty to add their costs of the appeal to their respective charges.

There is one other circumstance connected with this case to which reference has been made in the course of the argument, and as to which it may be well that no mistake should arise. By the order on further consideration made in the suit of *Faithfull v. Ewen* on the same day as the order appealed from, the life interests of the plaintiffs were impounded to make good the losses in the trust funds arising from the breaches of trust committed by the trustees and participated in by the plaintiffs and the defendant Sarah Maxwell Webb. The shares and interests of the plaintiffs upon which Mr. Brook is entitled to a charge under the order will, of course, be their beneficial interest actually recovered or preserved in the suit, viz., such shares and interests only as will remain after complying with the directions in the order on further consideration.

Solicitors: *Brook; Beaumont & Warren; W. F. Nokes.*
23 ENG. REP. 84

[7 Chancery Division, 504.]

C.A., Jan. 16, 1878.

504]

*WALTERS V. WOODBRIDGE.

[1868 W. 87.]

Trustee—Costs, Charges, and Expenses—Costs of Trustee defending Suit—Charges of Personal Fraud against Trustee.

The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately, and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:

Held (reversing the decision of Lord Romilly, M.R.), that the trustee was entitled to be paid his costs out of the estate as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character.

THIS was an appeal by the defendant J. M. Teesdale from the decision of the late Master of the Rolls refusing an application by summons to have Teesdale's costs of a suit of *Woodbridge v. Teesdale* [1868 W. 265] taxed as between solicitor and client, and paid out of the funds in court in this suit.

Frederick Woodbridge, the testator in the cause, died on the 1st of October, 1858, leaving a will, of which the testator's wife, *Harriet Woodbridge, his son William Woodbridge, and the above named J. M. Teesdale, were the executors and trustees.

The testator up to his decease was a partner in a brewery called the Red Lion Brewery. There was considerable difficulty in ascertaining the value of the testator's share and interest therein, and ultimately, after much negotiation, an agreement was come to on the 9th of March, 1860, for the sale of such share and interest to the surviving partner for £35,000, with interest at £5 per cent. per annum from the 5th of July, 1859.

On the 16th of April, 1860, the trustees filed their bill (*Woodbridge v. Woodbridge*) against the persons beneficially interested under the will, asking for a declaration that it was for the benefit of the persons interested in the testator's estate that the agreement of the 9th of March, 1860, should

be carried into effect, and that the trustees might be authorized to carry it into effect, and that if the court should be of opinion that it ought not to be carried into effect, then directions might be given as to realizing the testator's share in the brewery. The infant children of the testator's son Frederick Woodbridge, whose share in the testator's residuary estate was settled by the will, were among the defendants. Teesdale was a solicitor, and his firm acted as solicitors for the plaintiffs in that suit, and for all the defendants except Frederick Woodbridge and his wife and children.

The cause was heard as a short cause on the 21st of July, 1860, and a decree made which declared it to be for the benefit of the persons interested in the testator's estate that the agreement of the 9th of March, 1860, should be carried into effect, and authorized the plaintiffs to do so, and directed them to retain and pay the costs of all parties as between solicitor and client out of the estate.

In April, 1863, Mrs. Walters, a daughter of the testator, filed her bill in this cause to enforce a covenant by the testator contained in her marriage settlement for payment of an annuity, and to have the testator's estate administered, and a decree for that purpose was made.

In December, 1868, a bill (*Woodbridge v. Teesdale*) was filed in the name of the infant children of the testator's son Frederick Woodbridge, by J. Hancock, as their next friend, against the *trustees of the will, and the testator's [506 sons and his daughters and their husbands, for the purpose of setting aside the decree in *Woodbridge v. Woodbridge* on the ground that it had been fraudulently and improperly procured, and it asked that the trustees might be ordered to repay to the testator's estate the costs retained or paid by them pursuant to the decree in *Woodbridge v. Woodbridge*, and might be ordered to pay the costs of *Woodbridge v. Teesdale*.

The bill in *Woodbridge v. Teesdale* alleged that the bill in *Woodbridge v. Woodbridge* was filed by Teesdale's firm as solicitors for the plaintiffs, and that they also appeared for all the defendants therein except Frederick Woodbridge and his wife and children, and that the decree was made by the court in the belief that all facts favorable to the interests of the residuary legatees of the testator were fairly stated, which had not been done owing to the misconduct of Teesdale in conducting the negotiations which led to the agreement of the 9th of March, 1860, and in stating the nature of the compromise contained in that agreement. The bill alleged that

Teesdale for many years previously to the death of the testator had conducted the legal business of the brewery, that such business was very profitable, and that Teesdale accordingly was anxious to keep on good terms with the surviving partner, and for that purpose became privy to his acquiring the testator's interest in the business on the most favorable terms; that Teesdale's interest as solicitor to the brewery was directly opposed to his duty as one of the testator's executors, but that nevertheless he acted as such executor and as the sole legal adviser of his co-executors in the negotiations which resulted in the agreement and in the decree confirming it, and that he acted in collusion with the private solicitor of the surviving partner, who was a very large creditor of the brewery. As against William Woodbridge, the bill alleged that for some time after the testator's death he expected to be admitted as a partner into the brewery, and that as the testator had directed a considerable sum to be left in the brewery for his benefit if he became a partner, it was his interest to have the assets valued at a low figure, and that his interest as such expectant partner was greater than his interest as one of the residuary legatees, and was opposed to his duty as executor.

507] *As against the widow it was alleged that she knew the circumstances as to Teesdale and W. Woodbridge, yet allowed herself to be guided by them, and that she was guilty of a breach of trust in not insisting that the interest of the testator's estate should be protected by some person having no adverse interest.

On the 12th of January, 1869, Teesdale applied in *Walters v. Woodbridge* that he might be at liberty to defend the suit of *Woodbridge v. Teesdale*, and that his costs of so doing might be allowed him out of the estate. The Master of the Rolls held that as the bill in *Woodbridge v. Teesdale* contained charges of misconduct against Teesdale, no order could be made until the result of that cause was known, and his Lordship accordingly directed the summons to stand over till that cause had been decided.

Woodbridge v. Teesdale came on to be heard before Lord Romilly. His Lordship reserved judgment, and on the 18th of April, 1871, dismissed the bill with costs, being of opinion that the agreement of the 9th of March, 1860, was a proper one and beneficial to the estate, that the decree sanctioning it had been properly obtained, and that the charges of misconduct contained in the bill were unfounded.

The costs of Teesdale were taxed and execution issued against the next friend, to which the sheriff returned *nulla*

bona. Teesdale then took out a summons in the administration suit to have his costs of *Woodbridge v. Teesdale* as between solicitor and client paid out of the testator's estate.

Lord Romilly considered that he had no jurisdiction to order payment of these costs, for that the suit was defended by the trustee solely to clear his own character, and with some expressions of regret his Lordship dismissed the application on the 18th of April, 1872 (*).

Teesdale appealed.

The appeal motion came on in May, 1872, when it was found that the infant plaintiffs in *Woodbridge v. Teesdale* were not parties to the administration suit, nor bound by the proceedings in it. The court therefore ordered the motion to stand over, with liberty to apply to have it restored to the paper. Proceedings were then taken to make the infants parties to the proceedings, and after much litigation the cause was heard on further consideration, *and [508 the infants declared bound by the accounts taken in the suit. The appeal motion was now brought on again.

Macnaghten, for the appellant: The appellant has been decided to have been free from blame. These costs have been incurred by him as trustee of the will, and he is entitled to be indemnified against them out of the estate: *D'Oechsner v. Scott* (*); *Benett v. Wyndham* (*).

Southgate, Q.C., and *Chapman Barber*, for the plaintiff: The suit of *Woodbridge v. Teesdale* was a personal attack upon the trustee, and in defending it he was not defending the estate but himself. He defended it without leave, which was refused, because he was not thereby defending the estate.

[JESSEL, M.R.: The refusal of leave proves nothing. Lord Romilly could not give him leave to defend, and have his costs out of the estate, because for anything that could then be known the charges of misconduct might all have been true.]

Parker v. Watkins (*) is in our favor.

[JESSEL, M.R.: That case is obviously distinguishable. A mortgagee who defends a suit impeaching his security is only acting on behalf of himself; he is not defending the interests of anybody else.]

Dunning, for other parties.

Job Bradford, for the plaintiffs in *Woodbridge v. Teesdale*: This proceeding is irregular. The matter should have been left to be disposed of under the ordinary direction

(*) 20 W. R., 520.

(*) 24 Beav., 239.

(*) 4 D. F. & J., 259.

(*) Joh., 133.

to give the trustees their costs, charges, and expenses properly incurred: *Graham v. Wickham* ⁽¹⁾.

JESSEL, M.R.: I do not mean to say that separate applications by summons as to the allowance of costs, charges, and expenses are in all cases proper, but where there is a special case, which, as all parties know, must be argued before the court at some time or other, it is not *unusual to give special directions about it. Though the costs can be obtained under the common form of order, giving the trustees their costs, charges, and expenses properly incurred, directions are often given about them after a discussion before the court in the first instance. This course frequently saves the expense of an argument before the Taxing Master, and an appeal from his decision. I cannot therefore say that it was irregular for this summons to be taken out. The cause had been heard on further consideration, and there was no prospect of any speedy further hearing. Under these circumstances the trustee was not bound to wait, especially as there was a case which called for argument, and which appears to me one to render the course of proceeding which has been adopted perfectly proper.

Then, as regards the merits, the suit of *Woodbridge v. Teesdale* was in substance a step towards impeaching a compromise which has been decided to be a compromise beneficial to the estate. It was in form a suit to impeach the decree sanctioning that compromise—a decree without which that compromise could not have been carried out, since it was requisite to bind persons under disability. A decree, therefore, setting aside the decree in *Woodbridge v. Woodbridge* would have gone a long way towards doing away with the compromise. It is true that the bill in *Woodbridge v. Teesdale* proceeds on the ground of personal fraud imputed to one of the trustees in obtaining the decree; but whatever the ground was on which the decree was impeached, the suit was defended by the trustee, not on his own behalf, but simply as trustee. It seems to me, therefore, to come within the principle that where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity. Here the defence by the trustee was for the benefit of the trust estate; it is true that at the same time he defended his own character, but that was merely an incident. If he had died, and his

⁽¹⁾ 2 D. J. & S., 497.

co-trustees had defended the action, they must at the same time have defended him. The defence of his character, therefore, does not make the defence less a defence on behalf of the trust estate, and there is no reason why he should be left to bear his *own costs. The principle that a [510 trustee shall not make any profit from his office is rigidly enforced by the court, and the principle that while he acts in the due discharge of his duty he is to be indemnified against all loss ought to be enforced with equal strictness.

It has been urged that the appellant ought not to have a separate set of costs for appearing alone. But the case is one in which severance was clearly justified. Personal charges of fraud were made against him, and this justified the other trustees in declining to join with him.

Then it was urged that the suit was a suit by persons entitled only to one share of the residue. We are not deciding anything as between the owners of the different shares. We only decide that Mr. Teesdale is entitled to be indemnified out of the estate, not whether his costs ought, as between the owners of the different shares, to be thrown on one share rather than another.

JAMES, L.J.: I am of the same opinion. It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The court is very strict in dealing with trustees, and it is the duty of the court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

THESIGER, L.J.: I am of the same opinion.

Solicitors: *Merediths, Roberts & Mills; Lewin; Rooks & Co.; Young, Maples & Co.*

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C.A.

[7 Chancery Division, 511.]

V.C.B., Nov. 5, 1877: C.A., Jan. 17, 24, 1878.

511] *Ex parte DELHASSE. In re MEGEVAND.*Partnership—Loan—Participation in Profit and Loss—Partnership Law Amendment Act (Bovill's Act, 28 & 29 Vict. c. 86), s. 1.*

Though an agreement is expressed to be an agreement for a loan to a partnership under sect. 1 of Bovill's Act, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the act and the declaration, is to give him the rights and impose on him the obligations of a partner.

The act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of the business.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Prior and up to the 30th of June, 1869, Felix Delhasse carried on business at Manchester and at Bradford in partnership with J. G. Schlapffer, H. Notz, and F. Megevand, as merchants, under the firm of H. D'Hauregard & Co. This partnership was dissolved as from the 30th of June, 1869, and the dissolution was gazetted and all proper notices given.

On the 11th of June, 1869, written articles of agreement were entered into between Megevand of the first part, J. J. Schœppi of the second part, and Delhasse of the third part. These articles contained the following recitals: "Whereas the said F. Megevand and J. J. Schœppi have agreed to become partners together in the business of H. D'Hauregard & Co., Bradford, upon the terms, and subject to the stipulations, conditions and agreements with each other, and with the said F. Delhasse, hereinafter contained;" a recital of the 1st section of the act 28 & 29 Vict. c. 86; "And whereas, in order to form and carry on the said partnership business, F. Megevand and J. J. Schœppi have requested the said F. Delhasse to lend them the sum of £10,000 for the purpose of investing the same in the said business, which the said F. Delhasse has agreed to do upon the terms, and subject to the provisions, stipulations, and agreements in 512] that behalf hereinafter contained." *And it was thereby agreed by and between all the parties thereto as follows:—

1. "The said F. Megevand and J. J. Schœppi shall be and continue partners together from the 1st of July, 1869, to the 30th of June, 1872.

2. "The partnership shall be carried on under the style and firm of H. D'Hauregard & Co. of Bradford aforesaid.

3. "The capital of the partnership shall consist of the said sum of £10,000, and of such further sum or sums as may at any time during the continuance of the said partnership be advanced by any of the parties hereto, and which £10,000 and sums respectively shall bear interest at the rate of £5 per cent. per annum.

4. "The said sum of £10,000 is advanced by the said F. Delhasse to the said F. Megevand and J. J. Schœppi, by way of loan under the 1st section of the said act of Parliament hereinbefore recited, and such advance does not and shall not be considered to render the said F. Delhasse a partner in the said business. The said sum of £10,000 is to be paid exclusively from the property belonging to the said F. Delhasse and invested in the firm of Henry D'Hauregard & Co., Manchester. The two firms in Manchester and in Bradford shall have to agree between themselves upon the mode of payment of the aforesaid amount, without any interference on the part of Mr. Delhasse.

5. "The name of the firm shall be signed only by the said F. Megevand or J. J. Schœppi.

6. "The expenses arising from the business will include interest on capital, warehouse rent, salaries, and other miscellaneous expenditure.

7. "The books shall be kept by double entry, and an account current to the 30th day of June in each year shall be remitted within three months after that date to each partner, and duly signed. Similar account current to be remitted to Mr. Delhasse, who shall receive statement of account every three months, and who shall have the privilege to examine the books of the firm at any time.

8. "On the 30th of June in each year an inventory shall be made, and, after having deducted the expenses above mentioned, *the profit or loss shall be divided in the [513 following proportions, viz., 25 per cent. to Mr. Delhasse; 37½ per cent. to Mr. Megevand; 37½ per cent. to Mr. Schœppi.

9. "That neither of the partners shall be allowed to overdraw his private expenditure account more than £500 per annum, for which he shall be debited in account current.

10. "In case of death of any of the partners, an inventory shall be made six months after such a death, and the executors or administrators of such deceased partner shall be paid his share of the capital and interest due to him in account current, and according to the said last inventory; such reimbursement shall not be due until the expiration of the present contract, and only then in case the business be

continued, otherwise it shall not be due until the business is liquidated. In the case last aforesaid the surviving partner shall continue the business until the expiration of the present contract, and divide between himself and Mr. Delhasse, and *pro rata*, the share which the deceased has had in the business.

11. "In the case of the death of any of the partners the partnership to be dissolved if Mr. Delhasse demands it, and in such a case the liquidation of the business, if he shall require it, shall fall to the latter, who may, according to his option, substitute the surviving partner for a consideration to be agreed for.

12. "The partnership shall be dissolved, if Mr. Delhasse demands it, in case his original capital of £10,000 shall be reduced by losses to one-half of its amount.

13. "Mr Delhasse shall have the option to substitute any other person into his rights and obligations, and Messrs. Megevand and Schœppi on their part shall have the same option to substitute Mr. Delhasse, by reimbursing him his capital and interest.

14. "In case of death of Mr. Delhasse, his heirs, executors, or administrators shall not be allowed to withdraw his or any part of his capital invested in the business of Henry D'Hauregard & Co. in Bradford until the expiration of the present contract.

15. "If the present contract is not renewed six months before its expiration on the 30th of June, 1872, the partnership shall be dissolved on that date."

This agreement was twice renewed by all the parties to it, first, for a term of three years, terminating on the 30th of 514] June, 1875, *and then for a term of two years, ending on the 30th of June, 1877.

In addition to the £10,000 originally advanced by Delhasse, he from time to time advanced further sums for the purposes of the business, amounting to £6,000, for which he held acceptances of the firm as security.

On the 7th of September, 1876, Megevand & Schœppi filed a liquidation petition, describing themselves as merchants, trading as "H. D'Hauregard & Co." Their creditors passed resolutions for liquidation by arrangement, and appointed Henry Dickin trustee. Delhasse carried in a proof upon the acceptances for £6,717 11s. 5d., being the £6,000 with interest. The trustee rejected the proof on the ground that upon the true construction of the agreement Delhasse was a partner with Megevand & Schœppi, and as such could not prove in competition with the creditors of the firm.

On the 15th of May, 1877, an application to the county court by Delhasse that the trustee might be ordered to admit his proof was dismissed with costs.

Delhasse appealed to the Chief Judge. The appeal was heard on the 5th of November, 1877.

De Gez, Q.C., and *Smyly*, for the appellant, cited *Cox v. Hickman* ('); *Waugh v. Carver* ('); *Mollwo, March & Co. v. Court of Wards* ('); *Ex parte Mills* ('); *Pooley v. Driver* ('); *Ex parte Tennant* (').

Winslow, Q.C., *Ince*, Q.C., and *West*, for the trustee, were not called upon.

BACON, C.J.: No doubt at one time it might have been said that the law on the subject had been questioned, but the criticisms which have been passed on the case of *Waugh v. Carver* have thrown such light upon it that it is not worth while to go back to the case of participation in profits as the test of partnership, because the case *of *Cox v. Hick-* [515 *man* (')] has completely settled the law, and the judgment in that case goes principally on the ground that the relation of principal and agent must be established before the dormant partner, or the person lending his money, can be held to be liable for the debts contracted in the business. The act of Parliament which is called Lord Chief Justice Bovill's Act was passed probably with a view to the then state of the law. But the provisions of that statute are very plain, and are stated in the agreement out of which this contest arises. [His Lordship read sect. 1 of the act.] Beyond that the statute does not proceed otherwise than to inflict upon the lender a penalty by postponing the payment of his debt to the debts due to creditors of the other partners. In this case it appears that a partnership existed at Manchester and at Bradford, in which Mr. Delhasse was a partner. That partnership was dissolved, and a new partnership was constituted at Bradford between the present bankrupts, Megevand & Schœppi, and then, in order to enable them to carry on their business, Mr. Delhasse agreed to lend them £10,000, and he proposed to protect himself by the stipulations of this agreement and by reference to the statute, which he considered would prevent his being a partner in the concern. Accordingly in the bankruptcy which has happened he does not seek to prove for that £10,000, but he says that after the agreement was executed and the business commenced he

(¹) 8 H. L. C., 268.

(²) 2 H. Bl., 235.

(³) Law Rep., 4 P. C., 419; 4 Eng. R., 121.

(⁴) Law Rep., 8 Ch., 569; 6 Eng. Rep., 496.

(⁵) 5 Ch. D., 458; 22 Eng. Rep., 214.

(⁶) 6 Ch. D., 303; 22 Eng. Rep., 831.

lent them other moneys, that is to say, he became liable to pay, and did pay, for them other sums of money which were used for the purpose of carrying on the business of the partnership. It is not by mere reference to the statute, and by expressing an intention that a lender shall have the benefit of the statute, that the application of the general law can be excluded. If so it would only be necessary for a man to contract in writing to lend £5 and then afterwards to lend other sums of money, and bring them in and say, If bankruptcy happens I shall not forfeit the £10,000, as in this case, or any other sum, but I only forfeit or have postponed the £5 or other sum which I lent in the first instance, because I said I lent it under the act of Parliament. In this case, as in all others, the intention of the parties must be collected from the instrument to which they are parties, and all the sur-516] rounding *circumstances must be considered. As I read this agreement it is, in my view of the case, a very plain contract for a partnership by participation in profits between the three persons who are parties to it. The large share of prospective profits is the inducement to Mr. Delhasse to lend his money and join those persons, the persons to whom he lent it undertaking that he shall have a large share of the profits of the business they were carrying on by means of the money which he lends them. It was in the course of things that more money might be required, and that that money should become part of the capital of the concern. The agreement is that the borrowers request Delhasse to lend them £10,000 for the purpose of investing the same in the business, which he has agreed to do upon the terms and subject to the provisions afterwards therein contained. A great part of the argument was founded upon considerations drawn from the case of *Pooley v. Driver* (1), and that case is sought to be distinguished from the present, on the ground that there the lender had some specific right to some part of the property of the business, and might have applied for an injunction to prevent the misappropriation of any part of the capital which he had so lent. That is so in this case. The contract is that the £10,000 shall be invested in the business, not lent to the partners, for the purpose of carrying it on, and it is in fact the capital of the business, and yet it is said that no injunction could in the present case be granted, even if the partners had taken that £10,000 and invested it in shipping or other transactions foreign to the business. I cannot follow that argument. The advance is made, according to the recitals in the agreement, for the ex-

(1) 5 Ch. D., 458; 22 Eng. Rep., 214.

press purpose of carrying on the business of the partnership, and is to be subject to all the stipulations in the agreement. [His Lordship, after referring to the second and third articles of the agreement, stated:] Then the agreement goes on to provide that if at any time during the continuance of the partnership money should be advanced beyond the £10,000, it should be equally applicable to the business. As a matter of fact, Mr. Delhasse did advance £6,717 in addition. It became by the very terms of this agreement a part of the capital of the business, and can it be said that Delhasse would not *have had the right, if he found either [517 that his £10,000 originally invested, or any sum added to it since by way of loan, was being applied for other purposes than those contemplated by the agreement, to restrain them? I have no hesitation in saying that if that money had been appropriated to anything else but the carrying on of the business, Mr. Delhasse would have had a right to apply to the court to restrain the partners from so misapplying it. Then the stipulation in the 7th clause is that Mr. Delhasse shall receive a statement of accounts every three months showing the way in which every sum has been used and dealt with. That was evidently for the purpose of enabling him to exercise an option, and to say whether he was or was not satisfied with the mode in which his £10,000 was being dealt with. In my opinion, no plainer stipulation constituting him a partner as between himself and the other two gentlemen could have been devised. The agreement further provides that annually an inventory shall be made, and that the profit or loss shall be divided, and that the profit having been ascertained, Mr. Delhasse is to have 25 per cent., not only on his £10,000, but upon the whole profits made by the firm. An inventory is also to be made on the death of any of the partners within six months after their decease, and the executor is to be paid the deceased partner's share of the capital and interest in the concern, according to the statement shown in the inventory; it being provided that in the last event the surviving partner shall continue in the business until the completion of the contract, and that then an account shall be taken, and the proceeds of the business shall be divided between Mr. Delhasse and the surviving partner. How they can contend that that is not a stipulation for a partnership all the time that the business is carried on, and for a partnership share in the division of the property when the business comes to an end, I am at a loss to conceive. But the agreement goes even further, because it gives to Mr. Delhasse the power, in the event of the death

of one of the partners, or in the event of the original capital of £10,000 being reduced by losses to one-half, to dissolve the partnership and to liquidate its affairs; and yet the gentleman to whom that right is reserved is said not to be a partner, because he says under the Partnership Amendment 518] Act he has lent the £10,000 *to the firm. If that was enough the act of Parliament would be a cobweb, to be broken through by the most clumsy contrivances, or by such a device as is here resorted to.

Without going into the cases that have been referred to, all of which were elaborately considered by the Master of the Rolls in *Pooley v. Driver* (¹), I am of opinion that the agreement in that case and the present are for all practical purposes substantially identical. The object in each of them was, by means of Lord Chief Justice Bovill's Act, to secure all the benefits which a partner could derive from the business to be carried on, and at the same time to evade the liabilities which the law casts upon persons who participate in the profits of a partnership, whether dormant partners or active. The only exception that that act made in favor of persons who made such advances to a partnership on the condition of participation in the profits by way of interest, and at the same time declared that the money they advanced was a mere loan to the partnership, was that they could prove for it, but only after every one of the other creditors had been paid. In my opinion the case is identical with *Pooley v. Driver*, in which the Master of the Rolls, speaking of the advance, says (²): "Therefore, although they call it a 'loan,' and although I agree that, standing alone, the fact of the duration of the loan being the duration of the partnership might not of itself be conclusive, it all tends in the same way to show that this was really intended as an advance of capital to the partnership business, made for the purpose of carrying it on, and not as an ordinary loan." The concluding observations of the Master of the Rolls are these. Having examined the articles of partnership, he says, "These are the documents on which I am called upon to decide, and I must say that I have come to a clear conclusion that this is not a transaction of loan within the meaning of the act of Parliament, that the true relation of the parties towards one another was that of dormant and active partners, and not of mere creditors and debtors; that in this case I need not rely on one provision, or on two provisions, but on the whole character of the transaction from beginning to end. It is an elaborate device, an ingenious contrivance

(¹) 5 Ch. D., 458.

(²) 5 Ch. D., 490, 493.

for giving these contributors the whole of the advantages of *the partnership without subjecting them, as they [519 thought, to any of the liabilities. I think the device fails, and that, looking at the law as it stands, I must hold that they are partners and liable to the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts." It is not necessary for me in this case to go that length. The earlier part of the judgment of the Master of the Rolls, this being a question of proof in bankruptcy, I adopt entirely. Although I am not bound by the decision of the Master of the Rolls, I feel myself bound to adopt the reasons and principles which are there enunciated. I think the principle is plain. In this case there is a plain contract that with the £10,000 which Mr. Delhasse gave the traders first, and with such sums as he has given them since, they should carry on a trade for his benefit, out of which he should, at all events, have 25 per cent. in addition to the ordinary rate of 5 per cent. upon the sums which he had from time to time advanced. In my opinion Mr. Delhasse was a partner dormant, if not active, and not a mere creditor. Therefore the judgment of the learned judge of the county court is entirely applicable to the case, and this appeal must be dismissed with costs.

From this decision Delhasse appealed. The appeal was heard on the 17th and 24th of January, 1878.

De Gex, Q.C., *Herschell*, Q.C., and *McKeand*, for the appellant: According to the true construction of the agreement the appellant was not a partner, and therefore he is entitled to prove in competition with the creditors for the advances he made beyond the £10,000, those advances having been made, as we say, *dehors* the agreement: *Ex parte Mills* (').

The main question, therefore, is whether the appellant was a partner. Independently of the act 28 & 29 Vict. c. 86, s. 1 ('), *when two persons entered into an agreement [520 and said expressly we are not partners, could any creditor have a right to say, "You are nevertheless partners"? The

(¹) Law Rep., 8 Ch., 569; 6 Eng. R., 496.

(*) Sect. 1: "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the prof-

its, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

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appellant was never held out as a partner, and no creditor of the firm knew anything about him. *Waugh v. Carter* (1), and cases of that class, have been superseded by the decision of the House of Lords in *Cox v. Hickman* (2). Of course if the ostensible trader was the agent of the real secret trader, there would be a repugnancy in the agreement, and the latter could be sued as a partner. But that is not the present case. The principle of *Waugh v. Carter*, that he who takes the benefit must also take the burden, is now exploded. The law is settled by *Cox v. Hickman*. It was said there that it must be shown that the ostensible trader was acting as the agent of a principal who was the real trader. This would have been quite clear but for some of the observations of Jessel, M.R., in *Pooley v. Driver* (3). From an agreement to share in the profits it may be inferred that the one was the agent of the other, unless there is something in the contract to control this, something to show that this was not the real intention. This is clearly expressed in the judgment of Bramwell, B., in *Bullen v. Sharp* (4). The appellant had no control over the expenditure of the £10,000; the other parties could spend it in any way they pleased; he could not have obtained an injunction or a receiver. His only right was to see the books. *Pooley v. Driver* was quite a different case; there was a provision there that the money should remain in the business during its continuance. There is no such provision in the present case, it is a simple loan. Sharing the losses is not of itself sufficient to make a man a partner any more than sharing the profits. In *Mollwo, March & Co. v. Court of Wards* (5) the Rajah had full control over the business, and yet it was held that he was not a partner. The real test of partnership is agency: *Re English and Irish, &c., Assurance Society* (6). The judgment of Lord Justice James in *Ex parte Tennant* (7) lays down the law somewhat differently from that of the Master [521] of the Rolls in *Pooley v. Driver*. *The respondent says that a partnership ought to be inferred, because the agreement contains provisions such as would be found in a partnership deed. The parties, however, have said, We do not intend to be partners. No doubt, in spite of this, they would be partners if the court could see there was a mere device to obtain the benefit while avoiding the responsibility of a partnership. But the deed ought to be construed so as

(1) 2 H. Bl., 235.

(2) 8 H. L. C., 268.

(3) 5 Ch. D., 458, 476; 22 Eng. R., 214, 229.

(4) Law Rep., 1 C. P., 86, 125.

(5) Law Rep., 4 P. C., 419; 4 Eng. Rep., 121.

(6) 1 H. & M., 85, 106.

(7) 6 Ch. D., 303, 309; 22 Eng. R., 831, 836.

to carry out as far as possible the intention of the parties, and it lies on the respondent to show that, *ex necessitate rei*, a partnership was constituted. There is no question about holding out.

[BAGGALLAY, L.J.: Is there anything in the present case to negative the notion of a partnership, except the recitals of the act and the declaration that there is no intention to constitute a partnership?]

There is more than that. If the view of the Master of the Rolls in *Pooley v. Driver* (*) is right, the act puts a man who lends money to a trader on condition of receiving a share of the profits in a worse position than he was before, because the Master of the Rolls says that the act does not apply until you have shown that there is no partnership.

When a man expressly says, I don't intend to be a partner, are the ordinary rights of a partner to be implied in his favor? For the case must be decided just as it would be if the appellant was claiming the rights of a partner. The test which the Master of the Rolls puts in *Pooley v. Driver* (*), of a dormant partner, is fallacious, for a dormant partner is liable to the creditors, because he has agreed to be a partner. He has deprived himself of certain rights which *prima facie* he would have as a partner; whereas, in a case like the present, it is sought to give a man rights which *prima facie* he has not. In *Bullen v. Sharp* (†) losses were to be shared as well as profits, but it was held that there was not a partnership. Sharing profits and losses would, no doubt, if it stood alone, constitute a partnership; that would be the legal inference. The inference may, however, be rebutted, and there is enough to rebut it in the present case. There is nothing unfair in endeavoring to obtain the benefit of a partnership while escaping its liabilities, if it can be done consistently with the law. Clause 13 of the [522 agreement shows that the appellant could have been paid off at any time.

[JAMES, L.J.: The essence of the judgment in *Pooley v. Driver* (†) seems to be that if the party, who is said not to be a partner, intended to exercise a control over the application of the money which he advanced, and could have brought an action in respect of its application, then it was intended that he should be a partner.]

No such control is reserved in the present case. The intention clearly was that the appellant should not be a part-

(*) 5 Ch. D., 458; 22 Eng. R., 214. (†) 5 Ch. D., 476, 477; 22 Eng. R., 229, 230.

(†) Law Rep., 1 C. P., 86.

ner, and there is nothing in the agreement necessarily inconsistent with that.

Winslow, Q.C., *Ince*, Q.C., and *West*, for the trustee: The argument comes to this, that the court is to look only at the declaration in the agreement that the parties are not to be partners, and is to disregard all the other provisions, and to give the appellant the protection of the act.

[JAMES, L.J.: It is said that, independently of the act, there would not be a partnership.]

If the legal result of the agreement is a partnership, it does not signify what the parties call themselves. They cannot evade their legal liability by saying they are not partners. What is a partnership? A number of definitions have been given. *Vice v. Lady Anson* (*) and *Green v. Beesley* (*) are illustrations of the principle. Mr. Justice Lindley says (*): "The writer is not aware of any case in which persons who have agreed to share profit and loss have been held not to be partners." Each partner becomes by law the agent of the others for all the purposes of the business. Mr. Justice Lindley adds (*): "The inference that where there is community of profit there is a partnership, is so strong, that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist." *Cox v. Hickman* (*) is not inconsistent with this view. The question, as Lord Cranworth said (*), is whether the trade has been carried on on behalf of the alleged partner.

523] *[JAMES, L.J.: Could Delhasse have pledged the credit of the firm?]

There might be a partnership, even if the agreement was that one partner should carry on the business as he in his uncontrolled discretion thought fit, and that the other should have no power to interfere. But here, with the exception of the reference to Bovill's Act, and the declaration that there is not to be a partnership, all the provisions of the agreement point to a partnership. On the dissolution of the old firm, Delhasse, who was known to be the partner who had the capital, withdrew, leaving all his capital in it on the terms of this agreement; it was clearly a device to evade the responsibility of a partner. In *Ex parte Tennant* (*) the father's liability for losses was simply as a security for the son, as Lord Justice Cotton points out (*), whereas here the liability for losses arises out of the contract between the

(*) 7 B. & C., 409.

(*) 2 Bing. N. C., 108.

(*) Lind. Partnership, 3d ed., p. 19.

(*) Lind. Partnership, 3d ed., p. 23.

(*) 8 H. L. C., 268.

(*) 8 H. L. C., 306.

(*) 6 Ch. D., 303; 22 Eng. R., 831.

(*) 6 Ch. D., 314, 315; 22 Eng. R., 841.

parties. And Lord Justice Cotton says (1), "The way in which the profit is to be participated in is really the essence of the whole matter. If the business is carried on by one man as agent for another as principal, the mere fact that he carries it on for another gives that other whose agent he is the right, from his position of principal, either to the whole or to a share of the profits." The effect of the agreement in this case is to make the other two agents for Delhasse. The right to a share in the profits is given to him, not *quâ* debt, as in *Ex parte Tennant*, but *quâ* profits. Whether it is a case under Bovill's Act or not, it is essential to the notion of a loan that the lender should be able at some time or other to sue the borrower. There is no such right here. Delhasse could never have brought an action against the other two for his £10,000. His only right would have been to have the partnership accounts taken, to have the business wound up and the debts paid, and then to have his £10,000 paid out of the remaining assets. Megevand and Schœppi were under no personal liability to repay it. The agreement is really that the business shall be carried on by the two on behalf of the three. *Syers v. Syers* (2) is another illustration of the principles applicable, and *Moltwo, March & Co. v. Court of Wards* (3) assists our argument. [524 There, in delivering judgment, the court said (4), "Whenever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract." In *Ex parte Mills* (5), Lord Justice Mellish expressed an opinion that if an advance was made under the act, with an agreement for a share of profits, and further sums were advanced without any such agreement, with an intention to elude the act, the lender would be a partner. The agreement in the present case is an attempt to evade the law. In *Stocker v. Brocklebank* (6) there are *dicta* in our favor. The agreement to share profit and loss makes it clear that there was a partnership, whatever the parties have said.

Herschell, in reply: Sharing profit and loss does not necessarily constitute a partnership. There is no such rigid rule contrary to the intention of the parties. The rule formerly was that sharing in profits constituted a partnership,

(1) 6 Ch. D., 316; 22 Eng. R., 842.

(2) 1 App. Cas., 174; 15 Eng. R., 52.

(4) Law Rep., 4 P. C., 435; 4 Eng. R.,

134.

(3) Law Rep., 4 P. C., 419; 4 Eng. R.,

(5) Law Rep., 8 Ch., 569; 6 Eng. R., 496.

121.

(6) 3 Mac. & G., 250, 260.

but that is exploded since *Cox v. Hickman* ⁽¹⁾. A lender of money to a firm may make stipulations for his own protection without becoming liable as a partner.

[THESIGER, L.J.: Does not an advance by way of loan imply a personal liability to repay?]

A father might advance money to a son engaged in business as a gift, without becoming a partner. It is not enough to show that the provisions of the agreement are consistent with the existence of a partnership; it must be shown that they cannot be carried out without a partnership. Some of the stipulations in the agreement would be very unusual in the case of a partnership, e.g., the power given to Delhasse to make a stranger a partner without consulting his copartners. The case must be viewed just as it would be if Delhasse were now insisting that he was a partner. He may have agreed to surrender some of the ordinary rights of a lender, but that does not make him a partner. It would be 525] extraordinary *if the partner who found all the money could be turned out as soon as the business became profitable.

JAMES, L.J.: I am of opinion that the decision of the Chief Judge, affirming the decision of the county court judge, ought to be affirmed by this court.

No doubt the question is, what is the true intent and meaning of the contract between the parties, and what is the true legal effect of the real transaction between them, which must be gathered from the whole instrument and not from a few words in it which may have been inserted for some purpose or other. Every word ought to have its weight and ought to be well considered.

Now, in construing this contract, I will consider it first as it would have stood, omitting those two or three clauses upon which the principal reliance has been placed by the counsel for the appellant. [His Lordship read the whole of the agreement, except the recitals of the 1st section of the act, and of the agreement for the loan of the £10,000, and clause 4, and continued:]

Now, if that had been the agreement, could there be any doubt whatever what the relation between the parties was, namely, that Megevand and Schœppi were active partners, each of them having the power of signing the name of the firm, and that Delhasse was the dormant moneyed partner who was to have all the rights which a dormant moneyed partner would have in respect of the capital of the business? He would have had no right to interfere in the ordinary

(1) 8 H. L. C., 268.

management of the business, but so far as regards keeping the capital in the firm and preventing its being applied to any other purpose, and preventing the name of the firm from being pledged in any other than its legitimate business, Delhasse would have had every power that the other partners had. He would have had the power of preventing them from contracting debts except for the firm, and he would have been entitled to have the capital in his hands in case of the death of either of the ostensible partners. The property would have been the property of the firm, and Delhasse would have had the power of seeing that the assets were properly applied in discharge of the liabilities, and the right to take possession of *the whole thing and to [526 apply the assets in payment of the debts of the firm, and he would have been entitled to share in the interest of the deceased partner if he was minded to continue the business. He takes a share of the profits, and he is to bear his share of the losses. If ever there was a case of partnership this is it. There is every element of partnership in it. There is the right to control the property, the right to receive profits, and the liability to share in losses.

But it is said that there are other provisions in the contract which prevent it, having this operation, and which show clearly that the parties meant the relation of lender and borrower, and not the relation of partners, to subsist between them. And for that purpose reliance is placed on the recital of sect. 1 of the act—the recital of the agreement for a loan—and the declaration in clause 4, that “the £10,000 is advanced by Delhasse to the other two by way of loan under that section, and such advance does not and shall not be considered to render Delhasse a partner in the business.” Can those words really control the rest of the agreement? Do they really show that the intention was not in truth that which it appears to be by all the other stipulations? To my mind it is quite clear that they do not? When you come to look at all the other stipulations, they are utterly inconsistent with the notion of a loan by the one to the two, so as to make the two personally liable in respect of it in any event or under any circumstances whatever. The loan is said to be made to the two, but, when you read the whole of the agreement together, it is impossible not to see that it was not a loan to the two upon their personal responsibility by the person who is said to be the lender, but that it was a loan to the business which was to be carried on by the two for the benefit of themselves and him, and was to be repaid out of the business, and out of the business only, except

in the case of loss, when the loss would have to be borne by the three in the proportions mentioned in the agreement. The use of the word "lend," and the reference to the act, are, in my opinion, a mere sham—a mere contrivance to evade the law of partnership. The loan is a mere pretence, the object being to enable the so-called lender to be, not only a dormant partner, but the real and substantial owner of the 527] business, for whom and *on whose behalf it is to be carried on, and yet to provide that he shall not be liable for the loss, in case loss shall be incurred. In my view, it is the same thing as if B. were to set up a business to be carried on by A., he being nothing but a manager, B. being the real principal, although A. was buying and selling everything, and then, when the public found out who the principal was, when the thing came to an end, he could say, A. is the man you trusted. I was the real principal, but I am not liable to you, although the whole thing was mine from beginning to end. The law of England does not allow this to be done, and it appears to me that it equally does not allow a man to escape liability, who, though he is not the entire owner, yet is the substantial owner of a business, but takes in two persons as nominal partners to carry on the business, while in truth it is his business during the whole time. In my opinion this business was really Delhasse's business. No doubt the other two were receiving a large share of the profits, but they were receiving that share merely for the purpose of paying them for their management of the business, he being the person whose capital was to produce the profits. He was the person who was to bring in further capital if he thought fit to do so, as he in fact did, for although he did it by putting his name to bills of exchange, yet the money obtained by the discount of those bills of exchange went into the assets of the firm, and formed part of the capital out of which the profits would have been made, if the business had been a profitable one.

In my opinion, the mere insertion of the provisions, that the £10,000 shall be a loan under the statute, a loan by the one to the other two, and that there shall not be a partnership, cannot alter the real nature of the transaction, which had not the characteristics of a loan by the one to the other two. It was a loan to the business, and that business was carried on at the risk and for the benefit of Delhasse, as well as of the others, and I am of opinion that the agreement was in truth and in substance an agreement for a real partnership between all the parties.

BAGGALLAY, L.J.: I am of the same opinion.

As regards the effect of the agreement, I so entirely concur in *the observations which were made by the [528 judge of the county court upon the original hearing, that I do not propose to travel through the various clauses.

It appears to me beyond all question that Delhasse was constituted a partner by the agreement, unless the reference to Bovill's Act and the provisions of clause 4 make any difference. I think that that reference and those provisions are not sufficient to exclude a partnership if, upon the true construction of the agreement apart from them, a partnership would be established.

Now, in the first place, however much the parties may have intended it, I cannot consider that this was a loan within the provisions of the act, and for this reason: the act expressly provides only for a case in which the loan is made "to a person engaged or about to engage in any trade or undertaking." And, according to my view of the agreement in this case, this was not a loan made to the two ostensible partners, but a loan made to the business. It was made by Delhasse to himself as well as to the two partners, and this imposed on him, as on them, an equal obligation of bearing any loss in respect of it.

I asked Mr. Herschell in the course of the argument whether, in the event of one-half of the £10,000 having been lost in the course of the business, and of Mr. Delhasse then availing himself of the option to dissolve the partnership, it could be considered a loan of £5,000 or £10,000 due to him from the other two partners, or as a loan due to him from the business, and he could not sustain a claim for the whole £10,000 against the other two. It is perfectly clear that Delhasse would have had no right to more than that portion of the £10,000 which had not been lost in the carrying on of the business, and I think this view is confirmed by the 3d clause of the agreement. The £10,000 is there treated, not as a loan to the two partners, but as a portion of the capital of the business, the risk of losing which, as well as the chance of profit, Delhasse was to bear as well as the other two partners.

I quite assent to the proposition of Mr. Herschell, that one fair way of trying this question would have been this—to see whether, if Delhasse had chosen to assert the rights of a partner, he could have been prevented from so doing by either of the other parties. It appears to me clear that he is not deprived of *any of the rights of a partner, except [529 that of signing the name of the firm, and that he would be perfectly entitled to assert those rights against the other two.

THESIGER, L.J.: I am of the same opinion.

In arriving at a conclusion in this case, which is one of importance, I have endeavored to look first at the position of the parties apart from any consideration of the act of 1865, and then to see whether there is anything in that act which makes any difference in their position.

Now, apart from the act, the law applicable to the case has been laid down in tolerably distinct terms by the House of Lords in *Cox v. Hickman* ⁽¹⁾, and it is perfectly true that the House of Lords in that case laid it down that the proposition that a participation in profits constitutes an invariable test of partnership is not one which can be maintained. Lord Cranworth ⁽²⁾ gives as the test that which, no doubt, must now be taken as the proper test to be applied in all these cases, namely, that the real ground of liability as a partner is that the trade has been carried on by persons acting on behalf of the person whom it is attempted to make liable as a partner. But, in the very same page in which those words occur, Lord Cranworth also says that the participation in profits is in general a sufficiently accurate test, and that the right of participation in profits affords cogent, often conclusive, evidence of a partnership. If that be so, it follows as a logical consequence that if, in addition to participation in profits, the arrangement provides for a participation in losses, and also contains stipulations tantamount to the ordinary stipulations which one would expect to find in the case of a dormant partner, it is an *à fortiori* reasoning in such a case in favor of a partnership, and Lord Cranworth's words "cogent and often conclusive" must be changed into the words "still more cogent and often more conclusive evidence of such a partnership."

Now, is not that the real state of things under this agreement? The £10,000 is put into the business. I use the expression advisedly, because the £10,000 is treated under 530] clause 3 not merely *as a sum in respect of which interest at the rate of £5 per cent. is to be paid to the person who brings it in, but as the capital of the partnership which, equally with other capital which may be brought into the partnership from time to time, is to bear interest in the ordinary way of capital brought by partners into a business.

Then we find a variety of stipulations as to the mode in which the expenses are to be treated in order to arrive at the profits, the books which are to be kept, and the accounts which are to be furnished to Delhasse as well as to the two ostensible partners, all being stipulations such as are ordi-

⁽¹⁾ 8 H. L. C., 268.

⁽²⁾ 8 H. L. C., 306.

narily found in arrangements between ostensible and dormant partners.

Then comes clause 8, which, it must be observed, provides, not merely for a payment to the person who is said to have made an advance of money by way of loan of a share of the profits up to some limited extent, which might be supposed to be a fair remuneration for his risk, but for a payment of an indefinite share of the profits. And I observe that Mr. Justice Lindley, in his book on Partnership, in speaking of the different propositions which may be deduced from the decision in *Cox v. Hickman*, says, among other things ("), "that *prima facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent." That appears to me to be an accurate expression of the law as evolved from *Cox v. Hickman* ("). But in this case the agreement does not even rest there, because we find that it goes on to stipulate that Delhasse shall have rights even greater than those which an ordinary dormant partner would have, for, in the event of the death of one of the ostensible partners, the surviving ostensible partner is not to have the control of the liquidation of the business; Delhasse is to have the control of the liquidation, and he and he alone is to decide whether the business is to be continued. And, finally, instead of any personal liability attaching to the partners in respect of the payment of the sum which is supposed to be advanced by Delhasse, there is only a stipulation that, in the event of the contract not being renewed, i.e., the contract between the three, then the partnership is to be dissolved. The assets would then be got in, the accounts would be taken, and the whole *of the £10,000, [53] or, if a portion of it had been lost, only that portion which remained would be paid to Delhasse.

It therefore seems to me that, apart from Bovill's Act, it is impossible that words could have been used more strongly importing a partnership, or more clearly creating all the rights and obligations which attach to the relation of ostensible and dormant partners. There is only one clause which seems in any way to tend against that conclusion, namely, clause 13, under which the ostensible partners have a right "to substitute Delhasse by reimbursing him his capital and interest." I quite agree that to some extent that does tell against the notion of a partnership, and of Delhasse having the chief control of the business, but, on the other hand, it is consistent with a partnership, and is, in my opinion, in-

(") 3d ed., p. 45.

23 ENG. REP.

(") 8 H. L. C., 268.

sufficient to override all the other stipulations to which I have referred.

Then the question arises, is there any distinction, so far as this case is concerned, between the position of the parties under the act and that which they would have held apart from the act? Now it certainly appears to me a little difficult to discover what is the exact benefit which the act proposed to give to persons advancing their money to partnerships. At the same time I think one can see that, to a certain extent, there might be some benefit obtained from the act, for apart from it, as is stated by Mr. Justice Lindley in the passage to which I have just referred, the sharing of profits to an indefinite extent might *per se* constitute a partnership, for I take that to be the meaning of "*prima facie* constituting the relation of principal and agent." Under the act that would not be so, because it provides that "the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from the carrying on of such trade or undertaking, shall not of itself constitute the lender a partner;" and by the use of the term "a share of the profits," must be intended a share to an indefinite extent. But, on the other hand, the overriding words are "the advance of money," and not merely the advance of money, but "the advance of money by way of loan;" and I suggested to Mr. Herschell during the argument whether 532] those words must not be taken to *import a personal liability, and I did not understand him to dispute that they must. The only answer that he gave was this, that, although that might be the case, yet a gift of money by a father to a son for the purpose of his carrying on a business, and upon a contract to the effect of that referred to in the act, would not necessarily constitute a partnership. That is perfectly true, but it is equally true that such a gift would not come within the terms of the act at all, because it only provides for the advances of money by way of loan, and leaves any question of gift to the general law.

It seems to me, stopping at this point, almost impossible to say that this case is within the act at all, and, if so, the observations which I have made upon the position of the parties, apart from the act, apply.

But I think that even if the words "by way of loan" were struck out, still, looking at all the provisions of the agreement, by virtue of which there is a participation not only in

the profits but also in the losses, and where there are all the stipulations which are ordinarily found in copartnerships having dormant and ostensible partners, it would be impossible to hold that a case like this was intended to be brought within the provisions of Bovill's Act. That being so, and the provisions of the agreement between the parties being such, a mere statement of intention such as we find in different parts of the instrument cannot take the case out of the general law, which is, that, if in body and substance an agreement is one of partnership, a partnership is constituted with all the ordinary duties and liabilities flowing from it.

JAMES, L.J.: The appeal will be dismissed with costs.

Herschell, Q.C., asked for leave to appeal to the House of Lords. He stated that an action had been commenced against Delhasse by one of the creditors of the firm for £9,000, and was pending before the Master of the Rolls. In that action there would be a right of appeal to the House of Lords without any leave.

Winslow, Q.C.: The trustee ought to be protected against *costs. If the decision should be reversed, he might [533 be personally liable for costs.

JAMES, L.J.: I do not think the House of Lords is very likely, under the circumstances, to make the trustee personally pay the costs. Leave to appeal will be given.

Solicitors for appellant: *Phelps, Sidgwick & Biddle*, agents for Sale, Seddon & Hilton, Manchester.

Solicitors for trustee: *Paterson, Snow & Bloxam*, agents for Gardiner & Jeffery, Bradford.

See 13 Eng. Rep., 839 note; 21 Eng. Rep., 717 note; 22 Eng. Rep., 844 note.

An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and, upon sale being made, the landlord to be repaid his purchase-money first out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect of stock bought and fed under the agreement: *Musser v. Brink*, 68 Mo. Rep., 242.

An agreement binding one party to get out lumber during a specified season, the latter receiving a fixed proportion of the net profits of the job above

expenses, does not constitute the parties partners, if at all, except for the season specified, even though the agreement was made some time before: *Hull v. Edson*, 40 Mich., 651.

A. agreed with B. to manufacture lumber, and to receive in payment therefor a certain proportion of its proceeds, less "all advances in money or otherwise" by B. A. subsequently gave an order on B. for "all money due or to become due to me * * * under our contract," which B. accepted. Held, that the order incorporated the contract by its terms, and that B.'s general acceptance only bound him to pay the balance due A., after deducting advances: *Bryant v. Hagerty*, 87 Penn., 256.

1878

In re British Farmers Pure Linseed Cake Company.

C.A.

[7 Chancery Division, 533.]

C.A., Jan. 16, 1878.

In re BRITISH FARMERS PURE LINSEED CAKE COMPANY.*Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Fully paid-up Shares—Certificate—Estoppel.*

Shares in a limited company were issued as fully paid-up shares, by virtue of a contract not registered as required by the Companies Act, 1867, s. 25. The company issued certificates of these shares as fully paid-up shares. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid-up on the faith of the certificates. The company having been ordered to be wound up, the official liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid :

Held (reversing the decision of Hall, V.C.), that, as against a transferee who took the shares without notice that they had not been paid up in cash, the company was estopped by the certificates from saying that they had not been so paid up, and that the official liquidator was in the same position.

Blyth's Case (1) distinguished.

IN 1872 Nicolls entered into an agreement with John Bennett for the sale to him of a piece of land for £2,100. Before completion, Bennett, in September, 1874, contracted with W. J. Goulton for the sale of the land to him for £5,000 in cash and £1,000 in fully paid-up shares in the British Farmers Pure Linseed Cake Company, Limited. This company [534] had been registered in 1872 as a limited *company, with £20,000 capital divided into 4,000 shares of £5 each. The purchase was completed on the 2d of November, 1874, when Nicolls conveyed the land direct to Goulton, and the 200 shares in the company were transferred by Goulton to Nicolls as a trustee for Bennett. Nicolls was duly entered on the register of shareholders.

Certificates for the shares were issued by the company and delivered to Bennett, which stated them to be fully paid up.

On the 7th of April, 1876, an order was made for winding up the company, and Nicolls was placed on the list of contributories in respect of these shares. The official liquidator in October, 1877, took out a summons for a call of £5 per share on all the contributories, alleging that nothing had been paid on the shares. Goulton deposed that 1,100 shares, of which the 200 shares in question formed part, had been allotted to him or his nominees as fully paid-up shares in part payment for a mill which he had sold to the company; but there was no registered contract to satisfy the provisions of the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25. The shares thus issued were entered in the books of the company, and returned to the Registrar of Joint Stock Companies as

(1) 4 Ch. D., 140.

fully paid-up shares. The affairs of the company had been conducted in the most irregular way, and it was deposed by the official liquidator that it appeared from the books that no cash had been paid on any of the shares. There was, however, nothing to fix either Bennett or Nicolls with notice of any irregularity, or of the fact that the shares had not been paid up in cash. Nicolls opposed the summons, and the case was heard before Vice-Chancellor Hall in chambers. His Lordship ordered Nicolls to pay the call, on the ground, as it was stated, that it was incumbent on Nicolls before taking the shares to make diligent inquiry whether they were, as they purported to be, fully paid-up shares.

Leave was given to appeal direct from chambers.

Robinson, Q.C., and *Byrne*, for the appellant: If this decision is upheld, shares in limited companies will become unmarketable. A *bona fide* purchaser for value is surely absolved from all further liability if he has an acknowledgment under the seal of the company that the shares are fully paid up. *If the purchaser here had made inquiries, [535 it is clear that he would have learned nothing; but we say that there was nothing to put him on inquiry, and that he was not bound to inquire. In *Blyth's Case* (¹) no certificates had been issued, and there was no representation by the company.

Dickinson, Q. C., and *Millar*, for the official liquidator: The 25th section of the act of 1867 is express.

[JESSEL, M. R.: That section appears directed at persons who pay for shares otherwise than in cash. It cannot have been intended to throw upon *bona fide* purchasers the obligation of showing that shares have been paid for in money when they have an admission by the company that they are fully paid up.]

We submit that the Vice-Chancellor was right in holding that the purchaser was bound to inquire. If the shares were issued as fully paid up a registered contract should be called for—if not, there should be proof of payment. *Blyth's Case* is in our favor. It will be said that no certificates were issued, but the judgment did not turn on that.

[JAMES, L. J.: I did not mention the point. I thought it unnecessary; but both the other judges pointedly referred to the fact that the company had done nothing to mislead the transferee.]

The certificates were made out and the shareholder had a right to them.

[*Pritchard's Case* (²) was also referred to.]

(¹) 4 Ch. D., 140.

(²) Law Rep., 8 Ch., 956.

JESSEL, M.R.: This company was formed under a contract of some kind or other for the issue of fully paid-up shares. This contract was not registered, and the shares are therefore to be taken as issued without anything having been paid upon them, and on the footing that they were to be paid up in cash. The meaning of the 25th section of the Companies Act, 1867, is this, that you are prohibited from contracting that shares issued shall be paid for otherwise than in cash except by a registered contract. When the section says that the shares are to be deemed to have been 536] issued and to be **"held"* subject to the payment of the whole amount in cash, of course it means *"originally held,"* for it cannot mean that they are to be held forever subject to the payment of the whole amount, although nine-tenths may have been paid in cash. To put it in another way, it means that the shares are to be taken to have been issued so as to be subject to the payment of the whole in cash. The shares now in question are to be deemed to have been so issued, because the contract, whether honestly or dishonestly come to, was not registered.

The next question which we have to decide is, whether there is sufficient evidence of payment to bind the company so as to prevent the liquidator from saying that the shares were not paid for in cash. The facts are these: One Goulton obtained the shares from the company. He is said to have been a party to the alleged improper act. He bought property of one Bennett, who had contracted to buy of Nicolls, and he gave him in payment 200 of these shares. The company issued to Bennett, who was not a party to the fraud, and who is not even alleged to have had notice of it, share certificates stating that the shares were fully paid up. It appears also, that if Bennett had taken the trouble to inquire, he would have found in the return made to the Registrar of Joint Stock Companies that they were returned as paid up in cash. The position of things seems to have been that Bennett asked Nicolls to become a trustee of the shares, and instead of being registered in the name of Bennett they were transferred by Goulton to Nicolls as trustee for Bennett, and registered in the name of Nicolls as paid-up shares. Some years afterwards, the company was ordered to be wound up, and the official liquidator has called upon Nicolls to pay up the whole amount due upon the shares, upon the ground that nothing had, in fact, been paid upon them, and the Vice-Chancellor decided that the whole amount must be paid.

It appears to me that the statute by no means alters the

law as to what is sufficient evidence of payment. It simply makes the shares liable to be paid for in cash as if no contract had ever been made. In other words, it makes an unregistered contract for the issue of fully paid-up shares equivalent to no contract, but it contains nothing to take away the effect of what, before the statute, was sufficient evidence that the shares had been paid for in cash. Let us *consider for a moment the consequences of any other [537 decision. No person buying shares in the market as paid-up shares would be safe, for he would get nothing more than a certificate to show they were paid up. He might go to the company and look at the register, and he would find them registered as being paid up. He might, if he liked, go to the Registrar of Joint Stock Companies, and he would find them registered as paid up. He might go further, and inquire of the board of directors, "Are those shares paid-up?" The directors might say, "We were not directors at the time; we have no personal knowledge on the subject. They are entered as paid up in cash in our books, and we have no reason to doubt it." After that the winding-up takes place, and then it is said to him, "Please to prove that these shares are paid up." He says, "These are my documents, and I have no other mode of proof." Is not that sufficient evidence? According to the argument it would not be so, and the shareholder would be liable to pay again. Perhaps I am importing more personal knowledge of this subject than I ought, but I know that, as a general rule, companies call for the bankers' receipts to be sent to them before they issue the certificates of paid-up shares. The receipts then are returned to the company, and the shareholder has nothing but the certificate to show that the shares were paid up. But even if the receipts were not returned, but were kept by the shareholder, he would be no better off according to the argument of the respondents. Obviously such a construction would destroy the transferable nature of shares altogether, and would be fatal to the real intention of the act. The other construction leaves things just as they were, with this exception, that the shares shall be treated as payable in cash, and not in goods or services, or the like. When a receipt is given by the company, or a final receipt in the form of a certificate of payment, what more is a *bona fide* purchaser to ask for, and what occasion has he to make any further inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me that the company having made that representation by the certificate which is given for the purpose of

being used by the vendor as evidence of title, is estopped from saying afterwards that it has not received the money. 538] It does not matter what the form of the *receipt is, but the certificate under seal is considered the best form of receipt. It appears to me impossible that the company can be allowed to say that the shares were not paid up in due course. The 25th section does not authorize the company to do any such thing, and there is no distinction to be made between the rights of the company as a going concern and the rights of creditors after the winding-up.

Upon these grounds it seems to me that Mr. Nicolls is entitled to say, "You are estopped from saying that my predecessor in title has not paid in cash the whole amount of these shares, and therefore I ought not to be put on the list of contributories except as for paid-up shares." I am therefore of opinion that the order for payment made by the Vice-Chancellor cannot be sustained.

JAMES, L.J.: I am entirely of the same opinion. I think that the section to which we have been referred, and which has been so often before the court, does not in the slightest degree alter the general law of the land as to the effect of the conduct of a representation by companies, or companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them or by the officers to whom they have intrusted the management of their affairs. If a person goes to a company, and finding there the proper officer to give answers, says, "Has such money been paid to you in respect of such and such shares?" and the answer is, "Yes"; then the company is bound by the representation so made. A joint stock company has no statutory immunity from the consequences of its acts and representations. In this case the certificate, upon the faith of which the company got the shareholder to become registered on their books as a shareholder, says, "We have been paid in full." The shareholder says, "I took the transfer, I went and registered that transfer or allowed it to be registered in your books, I allowed my name to appear in your books as a shareholder upon the faith of your representation that the shares were paid up." It is said that if that be so the 25th section is reduced to a nullity, for that all the directors have to do is to go to a law stationer or a printer and get a certificate 539] nicely engraved, which says the shares are *fully paid up, and then the section is made nugatory, because there is a representation, by which the company is bound, that the shares have been paid up in cash. No doubt that

misrepresentation does bind the company as against any person who was not aware that it was an untrue representation and acted on the faith of it. Every person connected with a company who issues a certificate for shares as paid up in money, when the money has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in exactly the same way and to the same extent as if the money had been taken out of the coffers of the company to pay up the shares, or as if, by some fraud of the directors and the officers, receipts had been given for the payment when payment had not been made. If any person is a party to a breach of duty of that kind he can be made answerable in the winding-up for the consequences of that breach of duty. But that cannot affect the position of a person who says to the company, "You made a representation intending it to be acted upon by any person who should purchase those shares; I have changed my position on the faith of that representation, and you are bound, upon every principle of law and equity, to make good that representation upon the faith of which I was induced to act."

THESIGER, L.J.: I am of the same opinion. It appears to me that section 25 is simply dealing with the original character of the shares issued, and not with any questions as to the proof or disproof of payment on such shares, which questions are left to, and are entirely dependent upon, the general law. According to that law, any shareholder whom a liquidator endeavors to make liable as a contributory in respect of unpaid shares, may either show that the shares have been in fact paid up, or that the company, whom the liquidator represents, have, by their words, or by their conduct, estopped themselves from disputing that the shares have been so in fact paid up. Here we find that certificates have been issued expressing upon the face of them that the shares have been paid up, that the certificates have been handed to Mr. Nicolls, and upon the faith of the representations so made he has become a shareholder, without any notice that cash had not in fact been paid, and in respect of *what he has so done he is attempted to be made lia- [540] ble by the liquidator. It seems to me clear that the present case comes within the general law as to estoppel, and that he cannot be made liable.

It was then stated that since the order of the Vice-Chancellor the call had been paid, and the question was raised
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whether the court, being only a Court of Appeal, could order it to be returned.

JESSEL, M.R.: I am of opinion that we can, by the same order, direct a return of the money paid under the order which we reverse.

JAMES, L.J.: The Court of Appeal has original jurisdiction incidental to its duties as a Court of Appeal, and I am of opinion that in rectifying an order it can set aside what has been done under it.

Solicitors: *Bischoff, Bompas & Bischoff; Guillaume & Sons.*

[7 Chancery Division, 541.]

M.R., Dec. 14, 1877.

541]

*POOLEY V. BOSANQUET.

[1876 P. 265.]

Lis pendens—Motion to vacate Registration—80 & 81 Vict. c. 47, s. 2.

Where an action which was registered as a *lis pendens* had been dismissed for want of prosecution, the court, on a motion made *ex parte* on behalf of the defendant, under 80 & 81 Vict. c. 47, s. 2, to vacate the registration, made an order *nisi*, the plaintiffs to show cause within one week why the order should not be made absolute.

[7 Chancery Division, 543.]

M.R., Jan. 22, 1878.

543]

*MOORS V. MARRIOTT.

[1876 M. 181.]

Building Society—Default of Secretary—Claim against Estate—Priority over other Creditors—4 & 5 Will. 4, c. 40, s. 12.

Where the secretary of a benefit building society established and certified under 6 & 7 Will. 4, c. 32, and whose rules provided that the secretary's accounts should be regularly presented and audited, had misappropriated the moneys of the society that came into his hands, and died leaving his estate insolvent:

Held, that under sect. 12 of 4 & 5 Will. 4, c. 40, the building society was entitled to be paid out of the estate the amount of the defalcations in priority to other creditors, and that the want of due diligence on the part of the society in examining the accounts was no bar to the claim.

IN this case, in which an order had been made for the administration of the estate of George Marriott, deceased, the question which came before the court on further consideration was whether certain building societies were entitled to be paid their claim on the estate in priority to other creditors.

George Marriott was for some time before and at the time of his death the secretary and manager of the Portland Mu-

tual Permanent Benefit Building Society No. 1, and the Portland Mutual Permanent Benefit Building Society No. 2. These societies were established and duly certified under 6 & 7 Will. 4, c. 32, for the usual and authorized purposes. By the rules of each of these societies it was provided that the society should meet once at least in every month to transact the general business, when the bank-book should be exhibited by the secretary, and the amount deposited with the treasurer since the last meeting reported by the chairman; that the treasurer should receive the money at each subscription meeting, and on the following day should satisfy the secretary that the same had been paid to the account of the society at the bankers, and should deliver the pass-book containing an acknowledgment of such money to the secretary, which he should produce at the next meeting of the directors; that three directors should be appointed for the purpose of auditing the accounts of the current year of the society, and the annual accounts should be regularly audited, printed, and published under the superintendence of the directors. By another rule defining the duties [544] of the secretary, the said George Marriott was appointed secretary and manager of the society, and he was directed to produce at each monthly meeting the bankers' pass-book for the inspection of the members of the society.

It appeared that Marriott had, on his appointment as secretary and manager of the said societies, given a bond as one of the rules required; he was intrusted with the receipt of moneys and the keeping of the accounts of the said societies, and thus received and had in his hands from time to time divers sums of money paid to him by members in respect of their subscriptions, amounting in the whole to £341 10s. 9d. for the first named society, and £10 0s. 3d. for the secondly named society. These sums he had not accounted for, but spent them for his own purposes.

On the 2d of January, 1876, Marriott died, having made his will and appointed the defendant his executrix; and on taking the accounts the Chief Clerk certified that the said sums were due to the said societies respectively, and that the estate was insufficient to pay his debts in full.

At the time of the testator's death neither of the societies had obtained certificates of incorporation under 37 & 38 Vict. c. 42.

The two societies now claimed payment of the sums so found due to them in priority to the other creditors. They had presented their demand in writing, under sect. 12 of the

act 4 & 5 Will. 4, c. 40, for Amending the Laws relating to Friendly Societies (').

541] **Chitty, Q.C., and Carey, for the plaintiffs, who were creditors of the testator: The building societies of which the testator was secretary and manager claim against his estate, under sect. 12 of the act 4 & 5 Will. 4, c. 40, in respect of the moneys which he received but did not account for. We contend that this case does not come within the words of that section which apply to the estate of a person "having in his hands or possession" the money of the society, for here the testator had expended the moneys in his lifetime for his own purposes. Even if the statute does apply to the case of defalcation, the societies ought to have used due diligence in investigating the accounts of their secretary. The rules provide that there should be monthly meetings, when the bank-book should be exhibited by the secretary, and that the accounts should be regularly audited. If the rules had been properly acted upon, these defalcations would have been discovered. As the societies have thus neglected to investigate the accounts, they cannot now be in a better position than the other creditors.*

(') Sect. 12 of the act provides as follows: "That if any person already appointed or who may hereafter be appointed to any office in a society established under the said recited act" (10 Geo. 4, c. 56) "or this act, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall die or become a bankrupt, or insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands, goods, chattels, or effects, or property or estate, heritable or movable, or make any assignment, disposition, assignation, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators, or assignees, other persons having legal right, or the sheriff or other officer executing such process, or the party using such action or diligence, shall within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all moneys and other things belonging to such society to such person as such society or committee shall appoint,

and shall pay out of the estates, assets, or effects, heritable or movable, of such person all sums of money remaining due which such person received by virtue of his said office or employment before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence, and all such assets, lands, goods, chattels, property, estates, and effects shall be bound to the payment and discharge thereof accordingly."

By the act 6 & 7 Will. 4, c. 32, for the Regulation of Benefit Building Societies, it was enacted by sec. 4 that the provisions of the act 4 & 5 Will. 4, c. 40, should be applicable to any benefit building society.

By the act 18 & 19 Vict. c. 63, the act 4 & 5 Will. 4, c. 40, was repealed, but not the act 6 & 7 Will. 4, c. 32.

By the act 37 & 38 Vict. c. 42, to consolidate and amend the Laws relating to Building Societies, sect. 7, the act of the 6 & 7 Will. 4, c. 32, was repealed, with a proviso that this repeal should not affect any subsisting society certified thereunder until such society should have obtained a certificate of incorporation under the later act.

Bagshawe, Q.C., and *Bond Coxe*, for the building societies.

JESSEL, M.R.: The question is whether these societies are entitled to the benefit of sect. 12 of the statute 4 & 5 Will. 4, c. 40, or not.

*Mr. Marriott was the secretary and manager of [546 the societies; he kept their accounts and received their money. It is quite true that when he died he had no money of the societies in his hands, because he had spent it all, but his estate which is to be administered is of some value.

The section is as follows: [His Lordship then read the section.] Under this section the testator's estate must discharge the claim of the societies before all his other debts. But it is said that if the societies had shown due diligence, and had asked to see the accounts, they would have discovered the defalcations. No doubt: but in my opinion it is the very object of the statute to meet such a case as this. Committees of such societies, as a rule, do not look after their managers properly; they are generally composed of poor people, and the object of the Legislature was that if a society's trustees and officers turned out dishonest, the society should have the right of enforcing its claim against them in priority to all others. But it has been argued that the want of due diligence should now preclude the societies from enforcing their claim.

Now this is a legal demand and can be destroyed by a legal objection like the Statute of Limitations, but there is no equity in any other creditor to get rid of it. The non-enforcement of a legal claim barred at the end of twenty years for nineteen years and 364 days does not entitle any one to object to its enforcement on the last day, nor is a creditor who has stood by for five years and three-quarters prevented from calling his debtor to account in the last quarter of the year. There is no legal obligation on the part of a creditor to call upon his debtor to pay.

This is no question now between the societies and other creditors, but between them and their late manager's personal representative. The exact point was decided in a case which I have mentioned of *Engleheart v. Ordell*, which, as far as I know, is not reported. In that case a well-known solicitor of Lincoln's Inn, enjoying a very good reputation, was appointed receiver in a cause. The solicitors of the plaintiff and defendants, also solicitors in Lincoln's Inn, were well acquainted with him, and, instead of calling upon him to pass his accounts in the regular manner, allowed him to send in a general account of his dealings as receiver.

After his death it was discovered that he had falsified his [457] accounts; he died *insolvent, and it was found that a very small sum would be available for his other creditors if the claim against him as receiver were paid in full. The persons entitled in the suit under the decree presented a petition to enforce his recognizances.

The petition was dismissed by Vice-Chancellor Stuart, but his decision was reversed by the Lords Justices, on the ground that it was no answer to the legal demand under the recognizances, that the solicitors had not shown proper care in requiring the usual accounts, and that the legal demand was not affected by the want of due diligence. The simple contract creditors could not be heard to say that they had any right to object to the enforcement of a legal demand. I should be bound by that case even if I did not agree with it, which I do.

The claim of the societies must, therefore, be paid in priority to the other creditors.

Solicitors: *A. Hendriks; Kernot & Davis.*

See 7 Eng. Rep., 432 note.

The executors of sureties are liable for the defalcation of the principal committed after the death of their testator, and even after notice given by the executors that they would not be liable: *The Queen v. Leeming*, 7 U. C. Q. B., 306.

To an action of debt, brought by the United States, on the bond of a surety for a paymaster to the navy, the defendant pleaded matters which amounted to allegations of laches on the part of the United States in their dealings with the paymaster, and also that the defendant had revoked his bond; held, that the pleas were bad: *Raymond v. U. S.*, 14 Blatchford, 51; *U. S. v. Kirkpatrick*, 9 Wheat., 720-735; *U. S. v. Vanzandt*, 11 Wheat., 184; *U. S. v. Nicholl*, 12 Wheat., 505; *U. S. v. Minturn*, 21 Int. Rev. Record, 182; *Jones v. U. S.*, 18 Wall., 662.

The sureties pleaded that, after the collector had begun to neglect his duties, they demanded of the governor that he suspend the collector and appoint another to perform the duties, under the provisions of an act of the legislature, but the governor neglected and refused so to do, and the default of the collector, alleged in this suit, occurred subsequent to this request, whereby the obligors claim that they are not liable.

On demurrer to this plea, held, that this plea did not set up a defence to the action: that the laches or neglect of the officer of the government in such case did not relieve the sureties: *Florida v. Smith*, 16 Florida, 175.

Sureties in a bond, given to secure performance by their principal of future mercantile engagements, and in which *no period of limitation of liability is fixed*, who have notified the obligees that they will no longer be bound for future transactions, are held discharged from liability for transactions thereafter entered upon, where no change in circumstances by the obligees have occurred on the faith of a longer continuance of the suretyship, and they are not prejudiced by such withdrawal: *Jendevine v. Rose*, 36 Mich., 54.

A surety, upon an ordinary lease continuing from year to year, gave three months' notice in writing to the landlord that at the expiration of the then current year he would not any longer be responsible for rent; held, that at the expiration of that year he was discharged from any further liability: *Estate of Desilver*, 9 Phila., 302.

It furnishes no defence to the sureties of a collector that, if the warrant against their principal had been issued within the time prescribed by law, the

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amount due might have been collected of him. The provision is for the benefit of the public, and forms no part of the contract of the sureties: *Looney v. Hughes*, 26 N. Y., 514.

The sureties upon a bond, given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal, known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee.

It seems, that the rule is otherwise, where the default is of a nature indicating want of integrity in the employee, and this is known to the employer: *At. & Pac. Tel. Co. v. Barnes*, 64 N. Y., 385.

The United States is not responsible for the laches or the wrongful acts of its officers; and, when it takes an official bond, the obligors are conclusively presumed to execute it with a full knowledge of that principle of law, and to consent to be dealt with accordingly: *Hart v. United States*, 95 U. S. Rep., 316.

The omission of a collector of public revenue to remove a deputy collector, after knowledge of default by the latter, does not discharge the sureties of such deputy collector: *Pickering v. Day*, 2 Delaware Chy., 333, 375-9.

Sureties on the bond of an officer of a private corporation, whose office is annual, with power in him to hold until his successor is elected and qualified, are bound only for the year for which

he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer. Guaranteeing the good faith and honesty of such officer "during his continuance in office," means not an indefinite period, or for the time he may possibly hold such office by new elections, but his continuance in office under his then election and for the legal term: *Mutual Loan and Building Association v. Price*, 16 Florida, 204.

In an action by the lessor's indorsee against the lessee's guarantor, upon a written lease and guaranty, to recover rent due, it is no defence to answer that the rent sued for accrued after the death of the lessee, and during the occupancy of the premises by a third person: *Taylor v. Taylor*, 54 Ind., 356.

Defendant and another addressed to plaintiff a joint note in these words: "In consideration of your supplying to Mr. John McGuire supplies of, etc., out of your store for his business, we agree to become responsible for the payment of \$200 for such goods, and guarantee the payment of that amount, whether the same be due on note or book account, to you for said hardware, iron, etc." Held, a continuing guarantee.

Held, also, following *Bradbury v. Morgan* (1 H. & C., 249), that the death of one of the guarantors did not extinguish the guaranty, it not appearing that any notice had been given to plaintiff on behalf of the estate of deceased, or that the survivor supposed he was released by the death of the other, but, on the contrary, acknowledged his liability as still subsisting, and promised to settle: *Fennell v. McGuire*, 21 U. C. Com. Pl., 184.

[7 Chancery Division, 521.]

M.R., Dec. 4, 6, 1877; Jan. 28, 1878.

*KREHL V. BURRELL.

[551]

[1876 K. 30.]

Right of Way—Obstruction—Erection of Building after Action brought—Mandatory Injunction—Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2.

In an action for an injunction to restrain the erection of a building on a passage, over which the plaintiff claimed a right of way, where he had, on being informed of the defendant's intention, forthwith given him notice of his rights and commenced

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the action, and the defendant had, notwithstanding, continued and completed the erection of the building complained of,—the plaintiff's right having been established at the trial :

Held, that it was a case for a mandatory injunction and not for damages under Lord Cairns' Act.

THIS was an action brought by the plaintiff, as owner and occupier of a messuage or a public house, No. 27 Coleman Street, in the City of London, known as the "Three Tuna," with a restaurant and dining-room, to obtain an injunction to restrain the defendant from erecting a building on the site of an adjoining court, called Windmill Court, over which the plaintiff and his predecessors in title claimed an uninterrupted right of way to and from the said messuage for forty years.

The defendant had, shortly before the commencement of the action, purchased the houses around Windmill Court, and served upon the plaintiff a notice of his intention to build, and had begun obstructing the access to the plaintiff's premises, whereupon the plaintiff informed the defendant of his alleged rights, and on the 27th of April, 1876, issued his writ. The defendant, however, continued his building, which was a large and expensive structure, thus blocking up the access to the back of the plaintiff's house, which was, as the plaintiff alleged, essential for the purposes of his business, though there was a front entrance in Coleman Street.

In December, 1877, the trial of the action came on, and witnesses were examined. The court was of opinion that the plaintiff had established his right and gave a verdict accordingly, but directed the case to stand over to see what terms the defendant would propose.

552] *1878. Jan. 28. The case now came on for judgment. It appeared that the defendant offered a substituted right of way which the plaintiff was willing to accept, provided that the defendant paid him £700 for damages for the difference between the two rights of way, and £100 for being deprived of access to his house by Windmill Court during the defendant's building, and the costs of the action.

The defendant refused to accede to these terms.

Davey, Q.C., and *Everitt*, for the plaintiff, asked for a mandatory injunction.

Chitty, Q.C., *Hemings*, and *Clare*, for the defendant, contended that, as he offered the plaintiff another access to his premises which would be equally convenient, this was not a case in which, having regard to Lord Cairns' Act, a mandatory injunction should be granted, citing *Isenberg v. East*

India House Estate Company ('), *Aynsley v. Glover* (') and *Smith v. Smith* (').

JESSEL, M.R., then gave judgment on the verdict, and ordered that the defendant should be restrained from erecting upon or across the site of Windmill Court, or any part thereof, any building or erection so as to interfere with or obstruct the plaintiff's right of way or passage over or along the said court as the same existed before the commencement of the action. His Lordship added a mandatory order that the defendant, within three months from the date of the judgment, take down and remove any building or erection which he had, since the commencement of the action, erected or built on or across the site of Windmill Court, or any part thereof, so as to obstruct or interfere with the said right of way. His Lordship then continued as follows :

Before parting with the case I should like to say a few words about my view of the proper mode of exercising the discretion of the court in reference to the jurisdiction conferred on the court by the act 21 & 22 Vict. c. 27, commonly called Lord Cairns' Act. The words of the 2d section are general : "In all cases in which the Court of Chancery has jurisdiction to entertain an *application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

The plaintiff in this action was the owner of an inn or public house, No. 37 Coleman Street, in the City of London, with which he and his predecessors in title had, and enjoyed for many years without interruption, a user of a way or passage, and he claimed to be entitled as of right to such user. The user was undoubted, and the right was never disputed until the purchase by the defendant recently of the adjoining houses. The defendant threatened to obstruct the way, and the user of the passage or court, by erecting a large building. The plaintiff gave notice to the defendant that he was entitled to such way as of right, and on the defendant persisting in his threats the plaintiff brought an action, and issued a writ for an injunction on the 27th of April, 1876. Notwithstanding that the writ was issued, and

(1) 3 D. J. & S., 263. (2) Law Rep., 18 Eq., 544; 10 Ch., 283; 12 Eng. R., 726.

(3) Law Rep., 20 Eq., 500.

in spite of the assertion by the plaintiff of his rights, the defendant, with full notice, and without any reasonable ground that I could discover at the trial of the action, and indeed without any ground at all, for none has been brought before me, insisted upon obstructing the way, and built over it a solid, and I am told a large and expensive structure, which completely blocked it up.

The action having been commenced in April, 1876, was brought to trial in December, 1877, and upon the trial by oral evidence I thought the right of the plaintiff clearly established, and gave a verdict accordingly. But, considering the position of the parties, I thought it desirable to give the defendant an opportunity of coming to terms before I delivered judgment. I thought it more likely he would make good terms before judgment than he would afterwards; and in mercy to the defendant, so as not to put him entirely in the power of the plaintiff, I allowed the case to stand over. It seems that some terms have been proposed offering a substituted right of way, which the plaintiff is willing to accept, 554] *provided the sum of £800 is paid to him as damages. Whether or not that is a reasonable sum I have no means of ascertaining without a further trial, which of course I do not intend to have, these being terms of compromise and nothing else. At all events the sum in question does not appear to me to come at all within the description of extortion, especially considering the enormous benefit which would accrue to the defendant by allowing this expensive building to remain. So far I think my object has been accomplished. But, however, the defendant declines to pay the damages, and prefers, if necessary, to submit to an injunction, which of course he is entitled to do, for he is entitled to decide that for himself.

The question I have to decide is, whether the appeal to me by the defendant to deprive the plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is true he has another way to his house by Coleman Street; but it was obvious, when the facts were mentioned to me, that as regards the custom of the house it would be very seriously interfered with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice of the right belonging to the plaintiff, and in de-

fiance of that notice, without any reasonable ground, and after action brought, the rich defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the court, "You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,"—of course that simply means that the court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the *Lands Clauses Act, [555 to compel people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavored to deprive his neighbor, the man with small possessions, of his property, with or without adequate compensation.

Solicitor for plaintiff: *C. M. Roche.*

Solicitor for defendant: *E. Burrell.*

See 21 Eng. R., 862 note.

If a person owning a lot of land fronting on a highway conveys the rear part of the lot, which is surrounded entirely by the land of persons other than the grantee, the latter has a right of way by necessity to the highway over the remaining land of the grantor; but the mere fact that the grantor had for a long time used a particular route to the rear land will not justify the implication that he intended to convey a right to this way, and exclude him

from assigning any other practical and convenient way to the highway. If a grantee has a way by necessity over the remaining land of his grantor, and a particular way to the land conveyed has been so used by the grantor before the conveyance, and by the grantee after it, as to amount to a designation of this way as a convenient one, yet if the grantor obstructs this way, the grantee may go over parts of the land of the grantor: *Bass v. Edwards*, 126 Mass., 445.

[7 Chancery Division, 555.]

M.R., Jan. 29, 1878.

HAMPSHIRE V. WICKENS.

[1877 H. 112.]

Specific Performance—Agreement for Lease—"Usual Covenants"—Covenant against Assignment without License.

Agreement to accept a lease of a dwelling house in London "to contain all usual covenants and provisos." The lease contained a covenant not to assign without lessor's consent. In an action to compel specific performance of the agreement:

Held, that the covenant was not a "usual covenant," and that the agreement could not be enforced.

Haines v. Burnett (1) disapproved.

THIS was an action for specific performance of an agreement for a lease.

The plaintiff, Mrs. Hampshire, was at the time of the agreement mentioned in the pleadings lessee of a house in Elsham Road, Kensington, for a term of twenty-one years from the 25th of December, 1873, determinable by the lessor and lessee at the expiration of seven or fourteen years, and she had an undertaking in writing from the owners of the property that if she could obtain a responsible and respectable tenant at the rent of 100 guineas *per annum, they would accept from the plaintiff a surrender of her lease, and grant to such new tenant a lease of the house for the term of twenty-one years determinable by the lessee only at the expiration of seven or fourteen years.

The plaintiff having placed the disposal of the house in the hands of her agent, Mr. Parkinson, the defendant on the 22d of February, 1877, had an interview with him respecting a lease, and on the 23d of February wrote and sent to him the following letter:—

"With reference to our interview last evening, I am willing to take 43 Holland Road" (meaning 43 Elsham Road), "at the rent of £105 per annum for twenty-one years, determinable at my option at seven or fourteen years, on all usual covenants and provisos, provided the same be put into ornamental and substantial repair as arranged, and to pay £75 for the fixtures and fittings mentioned in the schedule you left with me. Rent to run from the 25th of March. Possession to be given on the 15th of March next. I shall feel obliged by a definite reply at once as I have other offers."

The defendant also gave the names of two referees.

(1) 27 Beav., 500.

On the 24th of February Parkinson wrote and sent to the defendant the following letter:—

“43 Elsham Road.

“On behalf of Mrs. Hampshire, I accept the terms contained in your letter of yesterday, subject to references being approved by the landlord, which I am quite convinced in your case is simply a matter of form.”

The references given by the defendant were approved of by the owners of the property, but the defendant subsequently refused to accept the lease, whereupon the plaintiff brought the present action, and claimed that the defendant might be decreed to perform specifically on his part the agreement contained in his letter of the 23d of February, 1877, and to accept a lease of the said house and premises.

There were various grounds of defence, but the only material one relied on by the defendant was this, that the new lease proposed to be granted him contained the following covenant on the *part of the lessee, “that he would [557 not, without the previous consent of the lessors, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant, and that he would not, without the consent of the lessors, put up thereon any bill for letting apartments.” The defendant alleged that this was an unusual covenant, and not within the terms of the agreement.

Chitty, Q.C., and *Creed*, for the plaintiff: The plaintiff, who was lessee of the house in question, had an undertaking from her landlords that they would, in the event of another responsible tenant being obtained, accept a surrender of the plaintiff's lease and grant a new lease at £105 per annum for twenty-one years determinable by the lessee at the expiration of seven or fourteen years. The defendant, by his letter, which constitutes the agreement, agreed with the plaintiff to take a lease on those terms, “on all usual covenants and provisos.” It afterwards appeared that the lease under which the plaintiff held contained a covenant on the part of the lessee, which would be inserted in the lease to the defendant, not to underlet or part with the possession of the premises without the previous consent of the lessors. This the defendant contends is an unusual covenant, but it is a less stringent covenant than one not to assign at all, and such a covenant would not, we submit, having regard to the nature of the property, be deemed unusual.

The decisions on this subject are conflicting. In *Church v. Brown* (¹), followed by *Buckland v. Papillon* (²), such a

(¹) 15 Ves., 258.

(²) Law Rep., 1 Eq., 477; Law Rep., 2 Ch., 67.

covenant was held not to be usual. On the other hand, in *Haines v. Burnett*⁽¹⁾, under an executory agreement to grant a lease of an hotel, to contain "such covenants as are usually inserted in leases of property of a similar description," it was held that the lease ought to be determinable on bankruptcy or insolvency, or on making any assignment thereof for the benefit of creditors.

[JESSEL, M.R.: In *Hodgkinson v. Crowe*⁽²⁾ the contrary was held.]

558] *In that case there was an agreement for the lease of a coal mine with all usual and customary mining clauses, which it was held could not include a clause of forfeiture in the event of bankruptcy, or a clause in restraint of assignment. But an agreement for a lease of coal is in effect an agreement for the sale of part of the inheritance, and has no analogy to an agreement for the lease of a public house or hotel.

Usual covenants must always be understood with reference, not only to the property, but to the locality in which it is situated. In *Wilbraham v. Livesay*⁽³⁾ Lord Romilly observed: "In this case, though there is distinct notice that the plaintiff was lessee, there was no notice, except of ordinary and usual covenants, and covenants in restraint of trade are not usual covenants, although in some localities they are common. The case might be varied by the particular situation of the property, as if a house were situated in Grosvenor Square I do not say that a covenant against converting the house into a shop would be unusual."

The same principle applies to a covenant not to assign without license. Thus, in *Strangways v. Bishop*⁽⁴⁾, where a purchaser had agreed to purchase a leasehold house at Greenwich, but did not ask to see, and was not shown, the lease, it was afterwards found that the lease contained a covenant not to assign without the lessor's license. The vendor having filed a bill for specific performance, Vice-Chancellor Kindersley said that "it had been objected that the lease contained a covenant that the lessee would not assign without the leave of the lessor, and it was contended by the defendant that the rule in *Pope v. Garland*⁽⁵⁾ ought only to apply to those covenants which are usual, and not to such a covenant as this. But, assuming that the covenant not to assign without leave was not a usual covenant—that is to say, one which, upon an agreement to grant a

⁽¹⁾ 27 Beav., 500.

⁽²⁾ Law Rep., 19 Eq., 591; Law Rep., 10 Ch., 622; 14 Eng. R., 823.

⁽³⁾ 18 Beav., 206, 209.

⁽⁴⁾ 29 L. T. (O.S.), 120.

⁽⁵⁾ 4 Y. & C. Ex., 394.

lease with the usual covenants, would be inserted as a matter of course; still, such a covenant was so common and ordinary, at least in or near London, that it was such a covenant as came within the *dictum* in *Pope v. Garland*, and therefore he did not think the existence of that covenant was any reason why the agreement should not be performed." *In this case there is no arbitrary cove- [559
nant not to assign, as it is stipulated that the lessor's consent would not be withheld from a responsible tenant. The way in which such a qualified covenant is to be construed was considered in the case of *Treloar v. Bigge* (').

In Jarman and Bythewood's Conveyancing ('), under the head of "Leases" there is a dissertation on "usual covenants," and the various cases on the question whether a covenant against assignment is to be so considered usual are collected, beginning with *Henderson v. Hay* (').

In the last edition of Davidson's Conveyancing the same subject is treated of ('), and it is only right to mention to the court that this covenant is not one of the "usual covenants" there specified. In this case, however, having regard to the locality of the property, we submit that the covenant comes within the terms of the agreement and ought to be specifically performed.

J. Hume Williams, for the defendant, was not called on.

JESSEL, M.R.: There are various objections to the contention of the plaintiff, but I only intend to refer to one of them, which arises thus: the defendant agreed to take a lease of the house "on all usual covenants and provisos."

The lease under which this property was held contained a covenant on the part of the lessee that he would not without the lessors' consent, "assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant;" and, further, that he would not without their consent put up thereon any bill for letting apartments.

That was a very special and very unusual covenant, but it is said that it is less extensive than a general covenant not to assign at all, and that if no objection can be made to an unrestricted covenant against assignment none can be made to a covenant that *is restricted. I think that rea- [560
soning is sound, and shall therefore consider whether an unrestricted covenant not to assign can be inserted among "usual covenants." I am of opinion that it cannot. This

(1) Law Rep., 9 Ex., 151.

(2) 3d ed., vol. iv, p. 297.

(3) 3 Bro. C. C., 632.

(4) 3d ed., vol. v, pp. 51-4.

was decided by Lord Thurlow in *Henderson v. Hay* (1), by Lord Eldon in *Church v. Brown* (2), and more recently by the Court of Appeal in *Hodgkinson v. Crowe* (3), affirming a decision of Vice-Chancellor Bacon (4), so that it cannot now be fairly disputed.

But I have been referred to a contrary decision in *Haines v. Burnett* (5). That case appears to me to be opposed both to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson v. Crowe*. In *Haines v. Burnett*, Lord Romilly, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee, or on his making any arrangement for the benefit of his creditors. That was in fact nothing less than a variation of the contract. I cannot see any reason for holding such a covenant to be usual. Yet it is rather difficult in looking at the case to understand how it was decided. Lord Romilly seems to have thought that in considering general covenants, and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property. But I cannot find any evidence on that point mentioned in the report, and it would seem that the judge, from his view of the nature of the property, inserted the clause. But when we look at the reasoning of Vice-Chancellor Bacon in *Hodgkinson v. Crowe* (6), I think it is conclusive against any judge being allowed to say from his own view that such a covenant ought to be introduced. The Court of Appeal affirmed that decision, and went further and held that, under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry except on non-payment of rent.

561] *Usual covenants may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind. Lord Eldon, in *Church v. Brown*, puts it thus (7): Before the case of *Henderson v. Hay* (1), therefore, upon an agreement to grant a lease with nothing more than proper covenants, I should have said they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate." Now what is well known at one time may not

(1) 3 Bro. C. C., 632.

(2) 15 Ves., 258.

(3) Law Rep., 10 Ch., 622; 14 Eng. R., 823.

(4) Law Rep., 19 Eq., 591; 14 Eng. R., 823.

(5) 27 Beav., 500.

(6) Law Rep., 19 Eq., 593.

(7) 15 Ves., 264.

be well known at another time, so that you cannot say that usual covenants never change. I have therefore looked at the last edition of Davidson's *Precedents in Conveyancing*, to see whether the usage is said to have changed. He says⁽¹⁾: "The result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely,

"Covenants by the lessee

"1. To pay rent.

"2. To pay taxes, except such are expressly payable by the landlord.

"3. To keep and deliver up the premises in repair, and

"4. To allow the lessor to enter and view the state of repair.

"And the usual qualified covenant by the lessor for quiet enjoyment by the lessee."

When he refers to "special circumstances" he means peculiar to a particular trade, as for example, in leases of public houses, where the brewers have their own forms of leases, the "usual covenants" would mean the covenants always inserted in the leases of certain brewers.

There is no mention of any other "usual covenants," and as nothing in this case has been lost for want of industry on the part of the counsel who have argued it, I am justified in saying that *there is nothing in any text-book or [562 book of precedents to show that a covenant not to assign is a usual covenant.

I am therefore of opinion that it is not a usual covenant, and I dismiss the action with costs.

Solicitors: *A. Leslie; H. Wickens.*

(1) 3d ed., vol. v, p. 53.

As to what are "usual covenants" in a lease, see Rawle on Covenants for Title (4th ed.), 26, 27, 39, 125; Taylor's Landlord and Tenant, §§ 45, 332-4; Woodfall's Landlord and Tenant (11th ed.), 110-112; 2 Seton on Decrees (4th ed.), 1322; Smith & Soden's Landlord and Tenant, 126-7, 152.

A covenant in a lease that the lessee shall have "the refusal of the prem-

ises at the expiration of the lease," for a specified term, is a covenant to renew the lease for the same rent for such term. It is violated by the lessor if he refuse to give a new lease except at an increased rent, and the acceptance by the lessee of a new lease at the increased rent after such violation, he at the time protesting against the right to exact the increased rent, and claiming

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to reserve his right of action for the breach of covenant, is not a waiver of the covenant: *Tracy v. The Albany Exchange Company*, 7 N. Y., 472.

The acceptance of a renewal lease under an original lease of premises, satisfies only the covenant to renew: it does not satisfy any of the other covenants in the original lease: *Lord v. Vreeland*, 24 How. Pr. Rep., 316, 15 Abb. Pr., 122, affirming 13 Abb. Pr., 195.

A covenant to renew a lease at a certain rent, without stating what covenants the new lease should contain, does not carry any of the old covenants with it. Therefore, although an old lease contained a provision that the tenant should pay taxes and assessments, yet, as the lessor merely covenanted to make a new lease at a given

rent and said nothing about covenants: *Held*, that he must give such new lease, exclusive of a covenant on the part of the tenant to pay taxes and assessments: *Willis v. Astor*, 4 Edw. Chy., 617.

The acceptance of a lease of land, "with all the privileges belonging thereto, as enjoyed by S. H.," an outgoing tenant does not subject the lessee to the obligation of a covenant of S. H., to leave all the buildings which he might erect during his tenancy: *Ombony v. Jones*, 19 N. Y., 234.

The extension of a term, subject to the covenants in the original lease, will apply such covenants to subjects within their scope existing at the extension, although they were unknown when the term was created: *Kearny v. Post*, 1 Sandf., 105, 2 N. Y., 394.

[7 Chancery Division, 562.]

M.R., Feb. 8, 1878.

CHILTON V. CORPORATION OF LONDON.

[1878 C. 16.]

Common Rights—Right of Pannage.

A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or an owner of land who keeps pigs, to go into the wood of the grantor and allow the pigs to eat the acorns or beech-mast which have fallen to the ground, and does not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber where ripe.

[7 Chancery Division, 568.]

M.R., Feb. 16, 1878.

568] **In re ACCIDENTAL DEATH INSURANCE COMPANY.*

Insurance Company—Policyholders—Limited and unlimited Liability—Winding-up—Marshalling—Compromise by Contributories—Calls for Costs—Exclusive Liability of Contributories who have not Compromised—Companies Act, 1862, s. 38, sub. 6; s. 160.

In the case of an insurance company in liquidation, whose assets are limited as regards policyholders and unlimited as regards other creditors, sect. 38, sub-sect. 6, of the Companies Act, 1862, is only intended to protect the contributories as against the claims of the policyholders, and does not affect the liability of contributories who have not compromised their liabilities, under sect. 160, to pay the whole of the costs of the liquidation, although the whole of the nominal share capital has been called up.

The deed of settlement of an insurance company registered in 1854 under 7 & 8 Vict. c. 110, provided that every policy issued by the company should contain a proviso limiting the claims of the policyholder to the amount of the share capital, but left the liabilities of the shareholders in other respects unlimited.

All the policies issued by the company contained the required proviso.

In 1868 the company was ordered to be wound up.

During the liquidation the whole of the nominal share capital was called up, and several of the contributories compromised their liabilities by agreements with the liquidator in manner provided by sect. 160 of the Companies Act, 1862, and Rules of 1862, Sched. III, Form No. 50.

The liquidator having, for the purpose of raising a fund for the payment of the past and future costs of the liquidation, made a further call on those contributories who had not compromised:

Held, that those contributories were not entitled to require that the amounts received under the compromises should be marshalled between the liability for costs and the liability under policies; and that the contributories who had not compromised alone remained liable for the costs of the liquidation.

[7 Chancery Division, 573.]

V.C.M., Nov. 5, 6, 7; Dec. 19, 1877.

***JACKSON V. NORTH EASTERN RAILWAY COMPANY. [573**

[1875 J. 76.]

Company—Deed securing Advances—Recital acknowledging Debt—Specialty Creditor.

A deed dated in 1860 between a company, J. a director, and certain trustees, recited the acquisition of certain collieries by J. on behalf of the company, that the outlay had been provided as to £467,079 out of the company's money, and as to £43,216 by J. for the benefit of the company, and thereby J., in consideration of the repayment of the £43,216 being secured in manner appearing, conveyed the collieries to the trustees upon trusts to secure, first, the £467,079, and secondly, the £43,216 "so due to J." The holding of collieries being *ultra vires* the company, and an act of Parliament having directed the sale of the collieries, the property was sold and did not realize sufficient to pay the £467,079:

Held, that the deed of 1860 did not constitute J. a specialty creditor of the company, but only operated to give him a charge upon the property comprised in the deed.

THE plaintiff in this suit, who was the son of Ralph Ward Jackson, claimed to be entitled, as the transferee of a mortgage given by his father to a Mr. Watson, to have the trusts of a deed of the 23d of February, 1860, carried out under the direction of the court, and to have payment by the North Eastern Railway Company of a sum of £43,216, with interest thereon at 5 per cent. from the date of the deed, amounting altogether to £80,000.

It appeared from the statements in the bill that Ralph Ward Jackson, who was formerly a solicitor at Hartlepool, was the projector of the system of railways and the harbor which were now established there. The Hartlepool Railway Company was originally an unincorporated joint stock company, formed in 1838, and regulated by deed of settlement, but was incorporated by act of Parliament in 1842. The Dock Company was incorporated by act of Parliament in 1844. The Clarence Railway Company was formed in 1829, and during the whole period of the separate existence of the railway

companies and the Dock Company, up to the time of their amalgamation in 1852, and thenceforward up to the year 1862, the defendant R. W. Jackson was connected with the same companies; first as solicitor, then as managing director, and 574] ultimately *as chairman. During that period it was thought expedient to acquire a number of collieries for the purpose of feeding the railways with traffic and supplying the harbor with business, and in acquiring that property the sum of £467,079 was expended by the company, and the sum of £43,216, the sum now in question, was expended by R. W. Jackson out of his own moneys. It was admitted that the expenditure of these sums, though made for the purpose of increasing and securing the traffic of the railways and the business of the harbor, was irregular, and not in accordance with the objects for which the companies were incorporated. This irregular expenditure led to considerable dissatisfaction on the part of many of the shareholders, and eventually a committee of investigation was appointed in the year 1859, the chairman of which was Mr. Sturge, a retired merchant of eminence, in whom all parties reposed great confidence. After a year of continuous labor the committee made their report, from which it appeared that the committee were of opinion that although the aforesaid expenditure might have been in excess of the parliamentary powers, yet that the undertaking, with the collieries, buildings, lands, steamships, and other valuable surplus properties and assets of the company, furnished a good and ample security for all the capital, loans, debts, and expenditure of the company. And the committee, deeming it advisable that the exclusive benefit of the valuable traffic to the railway, port, and shipping places of the amalgamated company from the collieries, and that the advances and pecuniary assistance which had been made and rendered by R. W. Jackson and the companies, should be permanently and more effectually secured to the undertaking, gave instructions with that object for a deed which was executed on the 23d of February, 1860. The deed was prepared without any co-operation or suggestion of R. W. Jackson and his co-directors, but was solely prepared under the direction of the committee, and was approved of at a general meeting of shareholders.

This deed, which was made between the West Hartlepool Harbor and Railway Company, R. W. Jackson, and three trustees, recited the various instruments by which the collieries and property were acquired by R. W. Jackson and the company for the respective sums of £43,216 and £467,079,

and it recited that all the engagements *which the said [575 Jackson entered into, and the liabilities he incurred were so entered into and incurred with the concurrence of the board of directors of the company, and solely with a view of securing and increasing the trade and traffic of the harbor and railway companies, and not with any view of promoting the personal interest of the said R. W. Jackson, and that he had not gained thereby any pecuniary advantage, but on the contrary, he had expended out of his own moneys sums amounting to £43,216; and, further, that for promoting such objects, the company had from time to time advanced large sums of money, amounting in the whole to £467,079, in purchasing and obtaining, working and carrying on the collieries, and sinking additional pits and constructing requisite buildings, and in consideration of the repayment of the said sum of £43,216, being secured to R. W. Jackson, in manner thereafter appearing, it was declared that the collieries and other property were to be held upon trust in the first place to pay interest at £5 per cent. on the £467,079 advanced by the company, and in the next place, to pay interest at £5 per cent. per annum on the £43,216 so due to the said R. W. Jackson, or so much thereof as should for the time being be unpaid, such last mentioned interest to be paid to R. W. Jackson, his executors, administrators, and assigns, by equal half-yearly payments, and it was provided that unless the yearly rents and profits should in the current year be sufficient to pay the last mentioned interest after the payment of all the preceding interest moneys the said R. W. Jackson should not be entitled to receive or be paid the said interest, but only as much thereof as the said rents and profits should be sufficient to pay after all such payments as aforesaid; and so much of the said interest payable to R. W. Jackson as the rents and profits should not be able to pay should remain and be a debt (not carrying interest) to be paid and payable to the said R. W. Jackson not before, but together with and in the same manner as the said principal sum of £43,216 after payment of the sum of £467,079, and any further sum and sums of money which had been advanced or paid by the company since the 31st of December, these last to be paid to the company as therein-after provided. There was also provision made in case of any surplus, for investing it as a means of paying off the principal, and subject to those trusts the trustees were to hold the collieries *in trust for the company. There [576 was also power given to the trustees to carry on the collieries, and to pay the expenses out of the proceeds thereof,

and there was a covenant to indemnify R. W. Jackson out of the proceeds of the collieries, and from all liabilities incurred in the execution of the trusts.

By an act passed in the year 1863 the collieries were ordered to be sold within five years.

In the year 1865 the amalgamated companies were amalgamated with the North Eastern Railway Company, and by the 4th section of that act all the debts and liabilities of the before-mentioned amalgamated companies were thrown upon the North Eastern Railway Company.

It appeared that R. W. Jackson had become a liquidating debtor under the Bankruptcy Act, 1869.

The bill prayed that the trusts of the deed of the 23d of September, 1860, so far as they now remained unperformed, might be performed and carried into execution under the direction of the court; that an account might be taken of what was due to the plaintiff as assignee of Robinson Watson, and the defendant R. W. Jackson, in respect of the principal sum of £43,216, and interest thereon, secured to him by that deed, and that the defendant, the North Eastern Company, might be directed to pay to the plaintiff what should be found due to him on taking the account; that, if necessary, an account might be taken of all moneys received by the trustees of the same deed, and also all moneys received by the amalgamated company and the North Eastern Company in respect of the collieries and properties aforesaid, and of their respective applications thereof, and that the defendants might be restrained by injunction from applying or dealing with (otherwise than as prayed by the bill) any moneys received or to be received by them as representing the purchase-moneys arising from the said collieries and properties subject to the trusts of the deed of February, 1860; and that accounts might be taken and directions given for ascertaining the rights of the plaintiff in and to the said collieries and properties, and the proceeds of the sale thereof, and all moneys arising therefrom.

Higgins, Q.C., Loughborough, and Fawcus, for the plaintiff: We contend that the sum of £43,216 and interest 577] claimed in *this suit is a debt due by the railway company to Mr. Ralph Ward Jackson, the father of the plaintiff. This may be considered as the father's suit, and the contest really is between him and the company. We also contend that we are entitled to have the trusts of the deed of February, 1860, carried into execution under the direction of the court. It was through the energy and perseverance of Mr. R. W. Jackson that the West Hartlepool

Harbor, Railway and Dock Companies were established, and that the town of Hartlepool rose to be the prosperous town it now is. The money advanced by Mr. Jackson for the purchase of collieries and other property enabled the companies to compete with adverse circumstances. Great benefit was derived from the outlay, and it was admitted by the committee of investigation that Mr. Jackson in making these advances out of his own money was actuated only by a desire to benefit the companies, and not for his own personal advantage.

Our case is founded entirely on the deed of February, 1860, which we say constitutes a covenant to pay. The defence is that the deed amounted only to a charge upon the trust estate; and that estate having been sold for less than sufficient to pay the prior debt to the shareholders of £467,079, the funds of the company are not liable. But in answer to this, we allege that the company have dealt with the property in such a manner as to produce a much less amount than it would have produced if sold to the best advantage, and on that ground we ask for an account of the dealings with the property and of the amount actually realized. The trustees have never rendered proper accounts in respect of these sales, and it is their duty now to do so.

By the deed of February, 1860, the plaintiff's debt is fully and distinctly acknowledged, and it is recited that the money was advanced for the benefit of the company. This amounts to a covenant to pay the debt: *Hart v. Eastern Union Railway Company* (1). There are several cases cited in Addison on Contracts (2) which substantiate this doctrine, that every word which proves a man to be a debtor of any sum shall charge him with payment of the money. The rule is that an acknowledgment of a debt under seal makes it a specialty debt. Where, in a deed, a party admits *liability to money, a covenant that he will pay the [578 money may be inferred: *Courtney v. Taylor* (3). In the case of a mortgage without a covenant to pay, that would still be a specialty debt. *Farrall v. Hilditch* (4) is a leading authority showing that a recital of a debt amounts to an express covenant to pay. The same is shown by *Marryat v. Marryat* (5) and *Barfoot v. Freswell* (6); and in *Saltoun v. Houstoun* (7) a recital of a debt was held to amount to a covenant to pay it.

(1) 7 Ex., 246.

(2) 7th ed., p. 1008.

(3) 6 Man. & G., 851.

(4) 5 C. B. (N.S.), 840.

(5) 28 Beav., 224.

(6) 3 Keb., 465.

(7) 1 Bing., 433.

This deed was not prepared under the instructions of Mr. Jackson, but under the directions of the committee without his knowledge. At the time the deed was prepared the property was in Jackson's possession, and he did not then want to sue the company; but if the company came to sue him, he could have proved the knowledge of the directors and the acquiescence of the shareholders. It is our absolute right to have the trusts of this deed carried into execution.

[They also referred to *Ecclesiastical Commissioners of England v. North Eastern Railway Company* (¹), and *Jackson v. North Eastern Railway Company* (²), in which questions arose as to some of the circumstances alluded to in this suit.]

Glasse, Q.C., J. Pearson, Q.C., and Onslow, for the North Eastern Railway Company: The cases cited of *Courtney v. Taylor* and *Marryat v. Marryat* are distinguishable from this. The difference is pointed out by Lord Romilly, who decided *Marryat v. Marryat*, in the case of *Saunders v. Milsome* (³). There he says: "If a debtor executes a deed by which he admits the debt, and then conveys property to a trustee upon trust to sell and pay the debt out of the proceeds, that does not make the debt a specialty debt; but if by the deed he not only admits the debt, but agrees that if it is not paid before a certain time he will pay it, that clearly creates a specialty debt." In that case the instrument contained an agreement to execute a mortgage, with 579] the powers and covenants *incidental thereto; and the Master of the Rolls said that as such a mortgage would contain a covenant for payment of the debt, that was in effect an agreement to give a security, which would create a specialty debt, and the debt was therefore converted into a specialty debt.

This sum of £43,216 was not a debt of the company, but Jackson purchased the property and collieries for the company, and then conveyed them to the company upon the terms of having the money secured upon the property. He was only to be paid or secured upon the terms of that deed, which postponed his debt to the prior debt of the shareholders. It was a charge upon the property upon certain specified terms, and no more. There was no covenant to pay by the company, and Jackson was content to rely upon the effect of that deed. If it had been intended to make the money a specialty debt, the deed would have contained a covenant to pay, and its omission clearly shows the inten-

(¹) 4 Ch. D., 845.

(²) 5 Ch. D., 844.

(³) Law Rep., 2 Eq., 573, 575.

tion of the parties. We do not deny that Jackson did everything for the interest of Hartlepool, and we fully appreciate his energy and perseverance in the management of the companies. He no doubt thought it a wise plan to purchase these collieries for the advantage of the undertaking, but it could not in any sense constitute a debt due to Jackson by the company. It was impossible for Jackson to have brought an action against the company for the debt prior to the execution of the deed. Both parties had illegally expended the money for purposes *ultra vires*, and Jackson could not claim payment from the company out of their general assets; and as Jackson had really no claim for repayment, a covenant cannot be inferred. If the bargain was that the company should take on itself the payment of the money, and the money had been expended *intra vires*, then the deed would have been framed very differently. There is no statement in the deed that the company took upon itself the payment of the money, and it is impossible to infer a covenant to pay.

We do not deny that the North Eastern Company have taken upon themselves the liabilities of the amalgamated companies, but that does not affect the original illegality of the purchases. The act of 1863 made it compulsory upon the company to sell the property within five years. That was an acknowledgment that *the purchases were [580 *ultra vires*. By the act 7 & 8 Vict. c. 85, s. 19, companies are expressly prohibited from giving any security for money expended improperly, and if they illegally borrow money, any security they give for such money is invalid. The only way in which it has ever been attempted to evade this act has been by giving Lloyd's bonds. If this is set up as a simple contract debt, then we should set up the Statute of Limitations. This deed was prepared under the auspices of Mr. Sturge and the committee of investigation. It was therefore prepared with great care, and no doubt the framers of it carefully guarded against any implied covenant.

Hemming, Q.C., and *Lawrance*, appeared for a former trustee of the deed, who was also one of the trustees in the liquidation of the estate of Mr. R. W. Jackson.

The other trustee in the liquidation appeared in person.

Higgins, in reply: If there be a *bona fide* expenditure of money for the benefit of the company, that comes within the principle of *In re Cork and Youghal Railway Company* (¹) and *In re German Mining Company* (²). If the shareholders sanction the expenditure of money, and take

(¹) Law Rep., 4 Ch., 748.

(²) 4 D., M. & G., 19.

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the benefit of it, then the money, though expended *ultra vires*, may be recovered just the same as if it had been an act *intra vires*. Acquiescence on the part of the company is sufficient. Acquiescence is as much applicable to a company as to an individual. If we fail to establish a specialty debt, we have, under the case of *Marryat v. Marryat* (¹), a right to set up a simple contract debt because we have an acknowledgment of the debt. The facts show that the money was expended for the benefit of the company, and with the sanction and approval of the company.

MALINS, V.C., at the conclusion of the arguments, said one part of the relief sought by the plaintiff was that the money due to him might be paid out of the assets of the 581] company, but the *plaintiff also prayed in the alternative that the account might be taken of all moneys received by the trustees of the deed of February, 1860, in respect of the collieries and properties. The alternative relief he could now dispose of. The plaintiff alleged that the collieries had been sold at an inadequate sum, and under such improper circumstances that he was entitled to have an investigation, and he further alleged that if the properties had been sold for their full value, there would have been sufficient surplus after paying the £467,079 to pay him in full. It appeared that these properties had been sold during the years 1863, 1864 and 1866, and, considering the length of time which had elapsed since the sales, it was most improbable that the plaintiff could succeed in proving there was anything improper in the transactions, and if such a decree was made, the expense of it, if workable, would be so great that it would be positively detrimental to the interest of Mr. Jackson to have a decree in his favor. Lapse of time, and the surrounding circumstances, rendered it improper to grant that part of the relief sought.

With regard to the construction of the deed, that was an important question, and many authorities had been cited which he should desire to consider, and would, therefore, reserve his judgment.

Dec. 19. MALINS, V.C.: This case was very fully and ably argued before me on the 5th and two following days in November last. The object of the suit is to recover from the North Eastern Railway Company a sum of £43,216 with interest thereon at 5 per cent. from the 23d of February, 1860, making together upwards of £80,000.

The plaintiff, Mr. William Charles Ward Jackson, claims

(¹) 28 Beav., 224.

that large amount as the assignee of his father, Mr. Ralph Ward Jackson, who, it is contended, is entitled, under the deed of the 23d of February, 1860, to the provisions of which I shall have particularly to refer. The plaintiff claims to be the incumbrancer upon the fund for the sum of between £1,000 and £2,000 only, and the suit may therefore be practically considered as that of Mr. R. W. Jackson himself. [His Lordship then referred to the origin of [582 *the claim, and stated at length the deed of the 23d of February, 1860, already set out, and the several affidavits in support of the plaintiff's case, and continued:]

Now it was admitted on all hands that the effect of the deed was to make the collieries and other property which were vested in the trustees a security for the £467,079 advanced by the company and the £43,216 advanced by Mr. Jackson, and the interest upon those sums respectively. The plaintiff contends that its effect was also to make his father, Mr. Ralph Ward Jackson, a specialty general creditor of the company for the £43,216, with interest from the date of the deed. If such be the true construction of the deed, it is plain that the plaintiff has no occasion to have the trusts of it, so far as relates to the sale of the collieries, carried into effect. The company having, as it is admitted, a vast capital is abundantly able to pay the amount if liable to do so. With regard to the collieries and other properties comprised in the deed, it was admitted at the hearing that these had been sold in the years 1863, 1864, and 1866, for sums little more than half enough to pay the debt of £467,079 due to the company.

At the conclusion of the argument I disposed of that part of the relief sought by the bill which depended upon the investigation of those sales and reopening those transactions; and it is not necessary to go further into that part of the plaintiff's case now than to say that my conclusion was adverse to the plaintiff.

The only question, therefore, remaining is whether the deed did make Mr. Jackson a general creditor of the company for £43,216 and interest. If that was its effect it is certainly remarkable that the right of Mr. Jackson should not have been formally brought to the test at an earlier period, as it is clear that an action at law might have been maintained for the debt and interest at any time after its execution, now close upon eighteen years ago. The deed contains no covenant or express contract to pay the debt; but it is contended on the part of the plaintiff that an acknowledgment of a debt by an instrument under seal amounts to a

covenant to pay it; and the defendants admit that as a general proposition to be correct; and that it is so, is shown by the cases mentioned in Addison on Contracts ('), which 583] was cited by Mr. Higgins, by **Saltoun v. Houstoun* (') and *Saunders v. Milsome* ('); and the same principle was acted on in *Farrall v. Hilditch* ('), where it was held that an agreement under seal not to issue execution upon a judgment at a certain period amounted to a covenant not to do so.

But it is contended on behalf of the company that although this is the general effect of an acknowledgment of a debt by an instrument under seal, it will not have that effect when the acknowledgment is made for a collateral purpose, as they say it was in this case. And they mainly relied in support of that argument upon *Courtney v. Taylor* (') and *Marryat v. Marryat* ('). In the case of *Courtney v. Taylor* there was a debt which was owing by a man named Taylor, who had become a bankrupt, but after his bankruptcy he executed a deed in 1838, in which he acknowledged that the amount in question, the principal sum of £525 and the arrears of interest of £52, making together £577, were still due and owing from the defendant to the plaintiff, as the defendant did thereby acknowledge. Now, therefore, the admission of a debt, as a general rule, by an instrument under seal would amount to a covenant to pay it; and the question was whether it had that effect in this deed. If it was a general and unqualified admission, that was the effect of it, but if the object was to acknowledge that debt merely as the ground of giving security of a particular character for it, then it was not the creation of a personal liability to pay, but was only introduced with the object of giving security. The judgment on that point was given by Tindal, L.C.J. He says ('), "To charge a party with a covenant it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent. In the present case the question is whether or not the defendant did by indenture of the 30th of August, 1838, covenant to pay to the plaintiff the sum of £577 10s. The deed contains no express covenant to that effect; but it is argued that such covenant is necessarily implied. Looking at the whole scope of the deed, and considering the situation of the parties"—I may mention that the defendant who failed to pay the debt had 584] been *a bankrupt—"it appears to me that no such

(1) 7th ed., p. 1008.

(2) 1 Bing., 433.

(3) Law Rep., 2 Eq., 573.

(4) 5 C. B. (N. S.), 840.

(5) 6 Man. & G., 851.

(6) 28 Beav., 224.

(7) 6 Man. & G., 867.

intention is to be gathered from it." His Lordship then referred to the recitals, and said: "The plaintiffs contend that this acknowledgment of a debt due for principal and interest implies a covenant or agreement to pay it. It appears to me, however, that no such inference is to be drawn from this recital. Had it been the intention of the parties that the defendant should be liable to pay the £577 10s., nothing could have been more easy than to insert an express covenant for payment of the money. In the absence of such a covenant this acknowledgment may be supposed to have been inserted for some other purpose." Then his Lordship comes to the conclusion that the statement of the debt was introduced for a collateral purpose—not for the purpose of creating a personal liability to pay it, but merely as a ground of giving a security. Mr. Justice Coltman gave an opinion to the same effect, and then there is the passage in the judgment of Mr. Justice Maule which was frequently read in the course of the argument and commented upon, in which he says this (1): "The recitals mention a mortgage of the 31st of July, 1828, and a bond of the same date; and that the mortgage debt and bond still remain unsatisfied, and also a contract of sale for the aggregate amount of principal and interest; and a power of sale is given independently of that contract of sale. The object of the deed appears to have been to leave the defendant in the same situation as to liability in which he then already stood"—that is, he was not personally liable for it; and the object of the deed was not to create a personal liability—"and the action fails because the recital relied on is not an acknowledgment that the money was due and was payable on request, but to be paid on a conveyance being executed. Where in a deed a party unequivocally admits himself to be liable to pay money, a covenant that he will pay it may be implied. But where the deed sets out the instrument under which the liability arose, and does not expressly affirm that liability, I think the necessity for implying a covenant to pay does not arise. It would not be giving this recital its true and legitimate effect to construe it as a covenant for the payment of the money."

*This principle was very pointedly brought out by Lord Romilly in the case of *Marryat v. Marryat* (2). There the question was whether the claimant was entitled to rank as a specialty creditor against the estate of the intestate Samuel F. Marryat, or was a mere simple contract creditor. It arose under these circumstances. By indenture dated in 1852, made between Marryat, the intestate, and Hallett, a

(1) 6 Man. & G., 870.

(2) 28 Beav., 224.

creditor, which recited that Marryat was indebted to Hallett in the sum of £4,441 7s. 1d., as Marryat did thereby admit, and that Marryat was unable to pay it, and that Hallett had agreed to forbear enforcing payment, and that in consideration thereof Marryat had agreed to execute the assignment after-mentioned: it was witnessed that Marryat assigned to Hallett certain property to which he was entitled under the wills of two relatives upon trust to sell and out of the money received to retain the £4,441 7s. 1d., and interest, and to stand possessed of the residue in trust for Marryat. The deed contained no covenant for payment of the debt, but there were covenants for title and for further assurance only. Under the usual decree for the administration of Marryat's estate, the Chief Clerk found that £2,805 was due for principal and interest under the deed, but that it was a simple contract debt. A summons was taken out to vary the certificate, by allowing the debt as a specialty debt. The point which the Master of the Rolls, Lord Romilly, had to decide was, whether the acknowledgment by an instrument under seal amounted to a covenant to pay.

His Lordship said⁽¹⁾: "It appears to me impossible to distinguish this case from *Courtney v. Taylor*⁽²⁾, and that it is impossible to find a case more in point. In *Courtney v. Taylor* there was an acknowledgment of the debt, exactly in the words here used, not merely a statement of the amount of the debt, which was still due and owing, but as Robert Taylor "doth hereby acknowledge"—the same recital as here. The question is, what is the effect of that? It is admitted that if the sole object of the deed be to create an acknowledgment of the debt, then it does not matter in what terms that is expressed, and a covenant will be implied; but if the deed has another object, then a covenant will not be 586] implied from that acknowledgment." His Lordship further on says: "Though you may infer the promise to pay from the recital the promise to pay simply raises a mere assumpsit, unless the object of the deed is confined to that acknowledgment; but if the object of the deed is other than that, and merely collateral to it, then the recital amounts to nothing. In the case of *Courtney v. Taylor*⁽²⁾ nothing could be more clear than that the sole object was to give security for the amount of the debt, and that being the object of the deed, the court, though there was a recital expressly admitting and acknowledging the debt, said the object of the deed is to give this security and not to alter in any other respect the liability of the parties, and therefore this recital creates

(1) 28 Beav., 226.

(2) 6 Man. & G., 851.

no specialty. It is exactly the same here, this is a deed to create a security and containing an acknowledgment of the debt by the debtor, and all the judges in that case concurred that nothing was to be inferred from the deed to alter the character of the debt, and that there was no necessity for implying a covenant to pay. I am of opinion, consequently, in this case, that no covenant exists, that the Chief Clerk came to a right conclusion, and that the certificate must stand confirmed"—that is, that it was a simple contract debt.

As the situation of the parties to the deed was considered in those cases, it must also be considered in this case. The debt of £43,000 had been irregularly contracted by, but it is plain that it could not have been recovered against, the West Hartlepool Company by action or otherwise. Mr. Jackson had vested in him the property which had been so irregularly acquired, and that property he would have been at liberty to retain as against the company until they thought fit to pay all that had been expended upon it. That right he did not exercise; but upon the terms of the deed of the 23d of February, 1860, and the deeds which are there recited, he vested the property in trustees for the company. Then it would have been impossible, in my opinion, that a debt so created on the 22d of February, 1860, or any day before the date of the deed, could be recovered as a debt against the company. And if it was the intention to create an absolute liability in the company to pay, why was there not a covenant to do so inserted in the deed? The deed is stated to have been prepared by a very experienced and skilful *lawyer, the late Mr. Hawkins, of this bar; and if it [587 had been intended to bind the company to pay at all events, I am satisfied he would have inserted the usual covenant to do so. There is also a clause in the deed, which I think shows it was not intended to make the company liable for the debt. The effect of that clause is, that if the interest upon the £43,216 should be in arrear, that interest is not to carry interest; nor does it provide that it is to be paid by the company, but it is to be added to the principal—£43,216, and paid when that is paid, as I read it, out of the securities held for that purpose. If the interest, when in arrear, was only to be charged on the property which was made a security, why should the principal itself be otherwise secured? The one would naturally follow the other. Upon a careful and repeated consideration of the deed—I have considered it with anxiety to see if I could do that which I should have been very glad if I could have done—I am obliged to come to the conclusion that its only object was to make the prop-

erty which had been acquired by an irregular expenditure, a security for the repayment of that expenditure with interest, and not to create a general and absolute debt of the company.

As the bill, therefore, fails in establishing the liability of the company to pay the debt, and also in reopening the transaction as to the sale of the collieries and other properties, it must be dismissed.

With regard to costs, I confess I am not able to bring myself to the conclusion that the bill should be dismissed with costs; and I particularly am influenced in coming to that conclusion by this, that these disputes were gone into and settled in 1860, when the West Hartlepool Colliery Company, by a committee of investigation, presided over by Mr. Sturge, who made affidavits that there had been the fullest disclosure—the most complete fair conduct on the part of Mr. Jackson and all other persons connected with the company—after that had been done by the West Hartlepool Colliery Company, I do not think that the North Eastern Railway Company in this suit should have gone into them—they being the assignees of the West Hartlepool Company, and being bound by their acts—they ought not, in my opinion, to have raked up these old stories and endeavored to 588] reopen those most *painful disputes which had existed, but which were finally settled in 1860. I find by various passages in the answer that they are not satisfied merely to raise the question—the only question which it was necessary to raise in the case—namely, whether the deed operated as a security, and as to the sale of these collieries, and the price at which they were sold, and the persons to whom they were sold, and the circumstances under which they were sold, but they say “that the sum of £43,216 in the plaintiff’s bill and in the said indenture of the 23d of February, 1860, mentioned, was not, and that no part or item thereof was ever in any sense a debt due and owing to the said defendant, R. W. Jackson, from or by the amalgamated company. We further say and contend that even if any payments were in fact made by the said defendant, R. W. Jackson, out of his own moneys on behalf of the said companies, or any or either of them, while he was a director of them, such payments were made for illegal objects and purposes, and were not made at the request of the company.” So that while they have said under their own hand and seal that this money has been expended for the benefit and advantage of the company and not for the benefit and advantage of Mr. Jackson himself, by their answer they contradict

everything they have said by their deed, and they have raised, in my opinion, a most unjustifiable defence.

There is also another circumstance which is very much to be deplored, that while the amalgamated company obtained an act of Parliament in 1863 enabling them to sell their collieries, and providing that the £467,079 advanced by them should form part of the debenture debt of the company, yet, for reasons I am perfectly unable to comprehend, the £43,216 advanced by Mr. Jackson, and standing under precisely the same circumstances, was not put upon the same footing, and was wholly omitted, and he has been left without payment of a single penny in respect of it.

Under all these circumstances, although I am obliged to come to the conclusion there is no covenant, I am strongly of opinion that it is a debt which ought to have been paid; but being obliged to dismiss the bill, I dismiss it without costs.

Glasse, Q.C., asked whether his Lordship had considered, with *regard to the costs, that in this suit the de- [589] fendants were called upon by interrogatories to set forth exactly the same accounts which years before had been set forth in a previous suit.

MALINS, V.C.: I have considered that part of the case as well as all the other proceedings in the suit. Although Mr. Jackson has gone into the accounts again, it was not incumbent upon the company to set them out. They might have declined to do so on the ground that they had already been set out in the other suit. I still adhere to my determination to dismiss the bill without costs.

Solicitor for plaintiff: *W. F. Nokes.*

Solicitors for defendants: *Bell, Steward & Co.; Lawrence, Plews & Co.*

[7 Chancery Division, 589.]

V.C.M., Jan. 26, 1878.

STANLEY V. STANLEY.

[1864 S. 165.]

Fraud of Married Woman—Separate Use—Without Power of Anticipation—Judgment—Charging Order.

A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation.

The mortgagee obtained a judgment against her for the amount lent, and a charging order to charge her next accruing dividend:

Held, that such charging order must be discharged; for in no case and by no device could the restraint upon anticipation be evaded.

23 ENG. REP.

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MRS. STANLEY was entitled, under a will, to a sum of over £400 a year for her separate use, without power of anticipation, under her father's will. This will was stated in a bill filed in a chancery suit, and the clauses including the words "without power of anticipation" were set out in inverted commas. Mrs. Stanley and her husband desiring to borrow £1,000 from the Equitable Reversionary Interest Society in 1873, her interest under the will was offered as a security, and the following fraud was committed.

The husband produced to the society what purported to be the bill in chancery in which the above mentioned will 590] was set out, *and the part relating to the interest of Mrs. Stanley under it was printed in inverted commas; but he had previously erased from the printed bill the words "without power of anticipation," and caused the bill to be reprinted with this fraudulent omission.

There was evidence that Mrs. Stanley was cognizant of the fraud.

The solicitors of the society caused the probate of the will to be examined, but their clerk, being thus misled, did not notice the suppression, and the money was lent. Mr. and Mrs. Stanley gave a warrant to confess judgment as an additional security. Judgment was entered against them on the 9th of December, 1873, and a charging order was obtained in pursuance of the judgment to charge the next accruing dividend of Mrs. Stanley's fortune with the payment of the £1,000 so far as it would go.

The question to be decided was whether in a case of gross fraud such charging order could operate against income not due at the date of the charging order, which the married woman had no power to anticipate.

The Chief Clerk had declined to discharge the charging order.

J. Pearson, Q.C., and Brice, for Mrs. Stanley: The provision against anticipation ought not to be encroached upon: *Arnold v. Woodhams* (1); *Kenrick v. Wood* (2).

Glasse, Q.C., and B. B. Rogers, for the creditors holding the charging order: We rely on the judgment and charging order. A married woman's income was made liable for her misappropriation in *Pemberton v. M'Gill* (3). In *Claydon v. Finch* (4) it was held that under a writ of sequestration the accruing dividends of a married woman's fortune could be taken though there was a restraint upon anticipation.

(1) Law Rep., 16 Eq., 29.

(2) 1 Dr. & Sm., 266.

(3) Law Rep., 9 Eq., 333.

(4) Law Rep., 15 Eq., 266.

MALINS, V.C.: This is a case in which I can entertain no doubt. I consider that the fraud was fraud both of the husband and the wife, for the *circumstances show that [591 she knew what her husband intended to do and did. But notwithstanding this, I am bound to hold that in no case and by no device whatever can the restraint upon anticipation be evaded, and I must discharge the charging order.

Solicitors: *Boxall & Boxall; Clayton & Co.*

[7 Chancery Division, 591.]

V.C.M., Dec. 17, 18, 19, 1877; Jan. 21, 28, 1878.

MOFFATT V. FARQUHAR.

[1876 M. 133.]

Unlimited Company—Provisional Registration under 7 & 8 Vict. c. 110—Transfer of Shares to create Votes—Power of Directors to refuse Transfers.

A company with unlimited liability was formed in 1843 under a deed of settlement, and was afterwards provisionally registered under 7 & 8 Vict. c. 110. By their deed of settlement no shareholder was to have more than twenty votes, however large the number of shares held, and the directors had power to approve or disapprove of any person proposed by a shareholder as a transferee of his shares. A difference arose among the shareholders as to the management of the company, and the plaintiff, who was a large shareholder, transferred some of his shares to one person for value, and other shares to another person as trustee for himself, in order to increase his voting power. The directors refused to approve of the transfers, not from any personal objection to the transferees, but on the ground that the transfers were colorable, and were intended to increase the votes of the transferor:

Held, that the company was not a mere partnership, but came within the laws applicable to joint stock companies; and that the directors had no power to refuse a transfer, which was a right of property, except upon personal objection to the transferee. They were therefore ordered to approve of the transfers.

An inquiry was also directed as to damages.

THE New British Iron Company was formed under a deed of settlement, dated the 2d of November, 1843, and certain powers were granted to them by a private act of Parliament, 7 Vict. c. 30, and under those powers the defendant, as a director and proprietor, sufficiently represented the company. The company was also registered under the 58th section of the act 7 & 8 Vict. c. 110, but had not been completely registered under that act. The deed of settlement contained the following clauses:—

58. "That if five or more proprietors present at any general meeting of proprietors, and qualified to vote at a ballot as herein *is mentioned, shall, either before or after [592 the voting, by show of hands, demand that the votes thereupon be ascertained and taken by ballot, then the same shall be done accordingly, and in case of such ballot every pro-

prietor holding twenty shares in the company shall have one vote, and one additional vote in respect of each complete number of twenty shares (beyond the first twenty), held by him in the company, but no shareholder shall have more than twenty votes on the whole."

Sect. 82 was in these words, omitting parts not applicable to the present case:—

"That it shall be lawful for every proprietor of a share or shares in the company to procure some person or persons to become a proprietor or proprietors in respect of all or any of the shares for the time being belonging to such proprietor. And when any such proprietor shall have procured some person or persons who is or are willing to become a proprietor or proprietors, such proprietor shall give notice in writing at the office of the company of his or their having done so, and request the board to certify their approbation or disapprobation of such person or persons, and shall describe in such notice the full name and the profession or calling and place of abode of the proposed proprietor. And if the person or persons so proposed shall be approved of as hereinafter is mentioned, then and in such case such proprietor may transfer the same to such person or persons, and thereupon each or any such person shall, upon executing at the office of the company, or at such other place as the board of directors shall require, a deed of covenant to abide by the rules and regulations of the company, be entitled, as regards the share or shares so transferred to him or them, to call upon the board of directors to enter his name in the share register book, and the board shall accordingly do so, and upon such entry being made he shall become the proprietor or proprietors thereof: Provided nevertheless that no share or shares shall be transferred until all instalments or calls actually due and payable in respect thereof shall have been fully paid up."

Sect. 84. "That as well every transfer of a share as every deed of covenant to be executed as aforesaid shall be prepared according to a form to be sanctioned and approved of [593] by the board of directors, and no share in the company shall be transferred by any proprietor to any person who has not been first approved of by the board of directors or the committee of directors appointed as aforesaid, and if any transfer of any share or shares shall be made or attempted to be made to any person who has not been approved, the same shall be void."

The plaintiff was the registered proprietor of 3,031 shares in the company. In the year 1875 the plaintiff and certain

other proprietors (including Mr. Wythes, a director of the company), who held altogether more than three-fourth parts of the total number of shares, were desirous of having the company registered as a limited company under the Companies Act, 1862, and for that purpose to pass a resolution of the company in favor of such registration at a meeting of its members summoned for the purpose: a majority of three-fourths of the votes of the members present at the meeting being required by the act to pass such resolution. They were, however, opposed by the defendant and five other directors forming a majority of the directors of the company (there being only eight directors in all), and in consequence of clause 58 of the deed of settlement, the above mentioned shareholders, who were desirous of passing the said resolutions were not able to do so at the meeting of the shareholders summoned for the purpose on the 15th day of February, 1876.

In the month of November, 1875, the plaintiff agreed to transfer to Mr. Roger Eykyn 400 of his shares for the sum of £3,200. The plaintiff also at the same time made a similar agreement to transfer to his nephew, Mr. Robert Moffatt, 400 of his shares for the sum of £3,200.

On the 29th of November and the 6th of December, 1875, the plaintiff, having thus duly procured persons willing to become proprietors in respect of the said 400 and 400 shares respectively, sent to the office of the company a notice in writing of his having done so, and of the said agreements, and requested the board of directors of the company to certify their approbation or disapprobation of the proposed transferees.

The said Mr. Wythes, about the same time, sent to the directors a notice in writing of his desire to transfer certain of the shares held by him.

*The plaintiff alleged that the defendant and the five [594 other directors who were adverse to the registration of the company as a limited company perceived that if the plaintiff, and Mr. Wythes, were allowed to make transfers of some of their shares, the majority of the three-fourth parts of the votes of the company requisite to pass the resolution would in all probability be obtained. They accordingly determined to use the powers given to them by the deed of settlement for their own purposes and advantage, so as to prevent any transfers whatever of any of their shares by the plaintiff, or by Mr. Wythes, or by any of the proprietors who were in favor of the registration of the company as a

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limited company, which might increase the voting power of those who favored such registration.

In accordance with the above determination the directors, on the 7th of December, 1875, passed the following resolution and communicated the same to the plaintiff:—

“Mr. Wythes’ letter to the secretary of the 30th of November relating to the proposals for transfer sent in by him on the 19th of November was laid before the board, also a proposal by Mr. George Moffatt, dated the 29th of November ultimo, to transfer 400 shares standing in his name to Mr. Roger Eykyn, the consideration being £3,200, and a further proposal by the same gentleman, dated the 6th of December instant, to transfer 400 shares standing in his name to Mr. Robert Moffatt, the consideration being £3,200, when it was resolved unanimously,

“That the board having fully considered the above mentioned proposals, do not approve of the same, and that a communication to that effect be made to Mr. Wythes and Mr. Moffatt.”

The plaintiff alleged that this resolution was passed by the directors, not in a *bona fide* exercise of their discretion, or for the interests of the company, but solely for their own private purposes, and in pursuance of and to carry out their determination. The directors had not, and never had, any grounds of objection to the proposed transferees personally, who were in every respect fit and proper persons to be proprietors of the shares in the company proposed to be transferred to them, and who had always been and were still [595] ready and willing to accept and execute a *proper transfer to them of the shares respectively. That the directors, in fact, never made any inquiries of the plaintiff or otherwise as to the proposed transferees or the circumstances under which the transfers were executed.

The plaintiff, on being informed of the refusal of the directors to accept Roger Eykyn and Robert Moffatt as transferees of the shares, endeavored to ascertain from the directors what grounds they alleged they had for such refusal, and offered to prove that Roger Eykyn and Robert Moffatt were proper persons to become proprietors in the company. The directors, however, declined to state any reason for their refusal, or for objecting to the proposed transferees.

In consequence of this determination of the directors, the plaintiff's shares in the company had diminished in value, and the plaintiff would have to accept from Roger Eykyn and Robert Moffatt smaller prices for the shares agreed to

be transferred to them than the prices agreed upon for the shares in November, 1875, by which he had sustained considerable damage.

The plaintiff claimed as follows :—

That the New British Iron Company might be ordered to approve of Roger Eykyn and Robert Moffatt respectively as proprietors of the company in respect of the said 400 and 400 shares, and to certify such approbation. He also claimed damages for the improper refusal on the part of the company to approve of the transferees, and for the said improper conduct on the part of the directors.

The statement of defence was to the effect that the capital of the company was £400,000 divided into 20,000 shares of £20 each; only 19,860 shares had been issued, and upon them £17 each had been paid. The company had borrowed on debentures, and now owed £60,000. The plaintiff was owner of 3,031 shares, Mr. Wythes was the owner of 4,085 shares, and one other shareholder held 2,036 shares. Very few other shareholders held more than 400 shares each. The total number of shareholders was sixty-seven.

The plaintiff, with Mr. Wythes, Mr. Clive, and a few other shareholders, had for some time been desirous of converting the company into a company with limited liability. The majority of the directors were of opinion that if such conversion were effected the *capital of the company [596 should be increased in order to support their credit, and after much consideration the directors proposed a scheme of conversion under which every £20 share would be changed into a share of £30, but such scheme not being within the powers of the deed of settlement it was necessary to have the consent of all the shareholders. The plaintiff and those who sided with him were desirous of having an immediate conversion. In August, 1875, the directors received from Mr. Wythes five applications for transfers of shares, but the directors, believing that the transferees were intended to be mere trustees for Mr. Wythes, and that the only object was to enable him to have at his own disposal the additional votes that would be thereby created, they refused to approve of any of the transfers, and informed Mr. Wythes that, in the absence of satisfactory explanations as regarded the transfers, the directors did not feel justified in approving them. On the 29th of November, 1875, the application was made by the plaintiff for transfer of 400 shares to Mr. Eykyn in consideration of £3,200, and on the 6th of December for a transfer of 400 shares to Mr. R. Moffatt, also in consideration of £3,200. The board of directors duly con-

sidered these applications, and believing such transfers to be intended merely as transfers in trust for the plaintiff, and for the purpose of enabling the plaintiff to have the command of forty additional votes, they refused to approve of such transfers. The plaintiff afterwards inquired as to the reason for such refusal, and the directors stated that the decision they had come to was in the interests of the company.

Upon the hearing of the action the four principal witnesses examined were Mr. Eykyn, Mr. R. Moffatt, Mr. Farquhar, and Mr. Round, the chairman of the company.

Mr. Eykyn stated that the purchase by him was *bona fide*, and that he was ready and willing at the time of the purchase to pay £3,200 for the shares; that he was desirous of becoming a member of the company, and that he entertained the same views as the plaintiff in regard to the propriety of converting the company into a company with limited liability.

Mr. R. Moffatt, the nephew of the plaintiff, stated that it was not intended that he should actually pay for the shares to be transferred to him, but that he was to be a trustee for his uncle.

597] *Mr. Farquhar and Mr. Round gave details as to the position of the company, and confirmed the statements in the answer. They said it was the opinion of all the directors that it would be desirable to effect a conversion of the company, but they considered that it would injure the credit of the company to effect the conversion without increasing the capital, since at the present time all the money due upon the shares was called up except £3 per share, and there were debentures to the extent of £60,000; consequently the £3 per share would only be sufficient to satisfy the debenture debt, and there would be no further capital wherewith to carry on the business of the company.

Higgins, Q.C., and *Romer*, for the plaintiff: The question in this action arises upon the 82d section of the deed of settlement, which gives power to the board to certify their approbation or disapprobation of such persons as shall be submitted to them for the purpose of becoming proprietors of shares. This clause gives power only to raise a personal objection, and the directors have no further right to exercise a veto when they are called upon to certify their approbation or disapprobation. The board of directors say they are not bound to give any reason for refusing a transfer, but in fact they do give a reason, which is, that they do not approve of Mr. Moffatt having more than twenty votes. They do not allege any personal objection to Mr. Eykyn and Mr. W. Moffatt, who are altogether unexceptionable persons.

The case of *In re Stranton Iron and Steel Company* (*) is conclusive in favor of our argument, for there the largest creditors of the company required their transfers to be registered for the express purpose of increasing their voting power, and Vice-Chancellor Bacon ordered the transfers to be registered in time for the meeting then about to be held. Even in a case like the *National and Provincial Marine Insurance Company* (*), where an attempt was made to transfer shares to escape liability, and where the shareholder had gained time for his transfers by a trick, Sir J. Rolt felt great difficulty in refusing to direct the transfers to be registered, because he said that the transfers, made expressly to *escape liability, did not necessarily vitiate the trans- [598 fer, but he did not think it just and equitable under the circumstances to compel the directors to accept the transfers.

The directors under such a clause as this, it seems, are not bound to disclose their reasons for refusing a transfer, *Ex parte Penney* (*); but if there is evidence to show that the power has been exercised capriciously or unfairly the court has jurisdiction to interfere. The same principle was acted upon in *Robinson v. Chartered Bank* (*). The court will not even permit unnecessary delay in registering a transfer, as was decided in *Nation's Case* (*), *Lowe's Case* (*), and *Fyfe's Case* (*).

In *Pinkett v. Wright* (*) it was held that directors had no power to refuse a transfer until the transferor had paid a collateral debt which they claimed from him, that is, they could not exercise the power given them for one purpose, for another.

The Master of the Rolls decided in *Pender v. Lushington* (*) that it was perfectly lawful for a person to transfer his shares for the purpose of multiplying his votes. These directors are not exercising their power reasonably and properly, and therefore we have a right to come to the court to compel them to do so.

Sir H. Giffard, S.G., J. Pearson, Q.C., Wolstenholme, and Mansel Jones, for the defendant: Even if this were a joint stock company, the power given to the directors would be a discretion vested in them for the general benefit of the company, and the court would not interfere with that discretion if exercised *bona fide*, and not from any outside or indirect motive. But we contend that it is not a company

(1) Law Rep., 16 Eq., 559; 7 Eng. R., 581.

(2) Law Rep., 2 Ch., 685.

(3) Law Rep., 8 Ch., 446.

(4) Law Rep., 1 Eq., 32.

23 ENG. REP.

(5) Law Rep., 8 Eq., 77.

(6) Law Rep., 9 Eq., 589.

(7) Law Rep., 4 Ch., 768.

(8) 2 Hare, 120.

(9) 6 Ch. D., 70; 22 Eng. R., 640.

in the sense used by the plaintiff's counsel, and the cases cited have no application here, because we are not dealing with those bodies which have been created by the Legislature, and as to which certain incidents both by statute and by the construction of the courts have been attributed; but we are dealing with a partnership having particular regulations of its own, and the law of partnership is the law applicable to this body; we have nothing *to do with what is called company law. But if by any regulation sanctioned by law even an ordinary company had made such a regulation as exists here, and it had been part of the constitution of the company that no change should be made in the numbers of shareholders and in the transfer of shares without the sanction of the directors for the express purpose of limiting the voting power of particular shareholders, there is no authority upon such an hypothesis as that in which it has been held that the court would not enforce it. No case has been cited which is analogous to this. There is no case in which the court has defeated the intention of the constitution of the company. In a private partnership a new partner cannot be introduced without the consent of all the other partners, but here the partners generally have delegated to the directors that power, which, but for that provision in the deed, they would themselves have been entitled to exercise, and which any one shareholder might have defeated. This is a power constructed for the benefit of all the shareholders, and it is not limited to the person of the transferee. Mr. R. Moffatt admits that he was to be a trustee for his uncle, therefore as to him the transfer was clearly colorable.

The case of *Pender v. Lushington* ⁽¹⁾ proves no more than this, that, assuming the right to transfer, you cannot qualify that right except upon some principles which the law will recognize. Here there is no such question arising. In that case the right to transfer was admitted; here the whole question is whether there is a right to transfer.

We submit that this is in all respects a private partnership.

The case of *Taft v. Harrison* ⁽²⁾ has an important bearing on this case. That was a company in which the shares were transferable in one of two ways, and the court decided that the company being unable to adopt the alternative of purchasing the shares, that did not give the shareholder the alternative relief of being able to sell his shares to an outsider, and that the company being on the eve of being wound up, that was a sufficient justification for the directors refusing any transfer.

⁽¹⁾ 6 Ch. D., 70; 22 Eng. R., 640.

⁽²⁾ 10 Hare, 489.

In the case of *Ex parte Penney* (') the transferee was to be *approved of by the directors, and the board refused [600 to transfer without assigning any reason whatever ; and the court said they could not sit upon appeal from the decision of the directors unless it could be shown that they acted from some improper motive ; and Lord Justice Mellish said that as it was an insurance company it was of the greatest importance to secure a responsible body of shareholders.

Then as to the other cases cited. In *In re Stranton Iron and Steel Company* (") there was no limit there to the voting power. There was nothing to prevent the *Crédit Foncier* from splitting up their shares so as to get a larger voting power. That case only proves that where there was no limit to the power of voting, and where there was no limit as to that which did come within the operation, the parties holding the shares had a right to transfer them to whom they pleased, and the directors had no voice in the matter.

1878. Jan. 21. *Higgins*, in reply : The questions raised by the defendants are these : First, whether the company is a mere partnership as distinguished from a joint stock company, and, therefore, whether the cases I relied upon are entirely excluded from consideration of the main question ; secondly, whether the limitation on the voting power contained in the deed of settlement of the company is a portion of the constitution of the company absolute and irrevocable, and one that overrides or interferes with the provision relating to the power to transfer ; or, on the other hand, whether the limitation on the voting power is not subject to the power of transfer, and whether it does or not in any way interfere with the power of transfer ; and, thirdly, it was said as to one of the transfers that it was a colorable transaction, and therefore the plaintiff could have no assistance from this court in respect of it. On the last point it need only be said that the transfer to Mr. Eykyn is proved to have been for valuable consideration, and the transfer to Mr. R. Moffatt was that he should be a trustee for the plaintiff, and such a transfer is perfectly good, since a man has a right to give his shares away, or to do what he likes with them.

As to the first point, I contend that this is not a mere partnership. *Although it has not been registered [601 under the act of 1862, it was registered provisionally under the act 7 & 8 Vict. c. 110, and the company was constituted as a company with all the *indiciæ* and characters of a company by the original deed of settlement. It is there treated

(') Law Rep., 8 Ch., 446.

(") Law Rep., 16 Eq., 559 ; 7 Eng. R., 581.

and formed and constituted as a company, and it is called a company in the special act of Parliament. Moreover, it is a company within the definition of a company contained in the 181st section of the Companies Act, 1862, and also within the act of 1844. By the deed of settlement the capital is divided into shares, which are made transferable; there are provisions for appointing the board of directors, and there are all the characteristics of a company, and in the special act there are powers for the conduct of its affairs in various ways, and providing for a power to sue during winding up in case of dissolution, and containing the expression that "the company" shall mean "the New British Iron Company," together with all such provisions as are applicable to companies. But even if this were a mere partnership, the power of transfer is a paramount feature in the constitution of this company, and it would be incompetent for any majority of the shareholders to alter that fundamental characteristic of the power to transfer shares, though they might alter their voting power. The case of *Lovegrove v. Nelson* (*) is directly in point upon that subject, as are also the observations in Mr. Justice Lindley's book (*).

Then, secondly, it is said that the limitation on the voting power is part of the constitution of the company, but if I am right in my first contention this argument cannot be sustained, for the question is settled by the case of the *Stranton Iron Company* (*), in which that was the only question raised, and the transfers were made for the express purpose of increasing the voting power. The case of *Ex parte Penny* (*), which has been cited, is distinguishable from this, because there it was said that it would be an abuse of the power of vetoing a transfer to object on any ground not applying personally to the transferee. In this case there is direct evidence that the only ground of exclusion was the increase of the voting power, and there was no question as to solvency.

602] *In *Pender v. Lushington* (*) the transfers had no doubt been effected. In that case, like this, there was a limited voting power, and the same question arose as in this case. It was insisted that the object of the transfer was adverse to the interests of the company. The Master of the Rolls said that the company had no right whatever to enter into the question of the beneficial ownership of the shares, and the votes ought to have been admitted as good votes, inde-

(*) 3 My. & K., 1.

(*) 3d ed., p. 719.

(*) Law Rep., 16 Eq., 559; 7 Eng. R., 581.

(*) Law Rep., 8 Ch., 446.

(*) 6 Ch. D., 70; 22 Eng. R., 640.

pendently of any inquiry as to whether the parties tendering them were or were not trustees for other persons beneficially entitled to the shares.

MALINS, V.C.: This is a case of very great importance as affecting the interests of shareholders in joint stock companies. The New British Iron Company is one of long standing, having been formed by deed of settlement in 1843. It is therefore of thirty-five years' standing, and, from all I have heard, it is likely to have a perpetual existence. The total number of shares issued is 20,000 of £20 each. There have been 19,860 shares issued, and of these Mr. Moffatt holds 3,031, Mr. Wythes, who takes the same view as Mr. Moffatt, holds 4,085, and Mr. George Clive 2,026 shares; so that these three gentlemen hold 9,140 shares, or nearly half the number of shares issued. The amount paid up is £17 per share, therefore Mr. Moffatt's interest is very large, amounting to more than £60,000; but at the present nominal value of the shares, which is said to be £8, it is not less than £24,000.

It appears that in the year 1875 differences of opinion arose between some of the shareholders in this way: The company being one of unlimited liability, and every shareholder being consequently liable for every farthing he has in the world, it seems to have occurred to Mr. Moffatt and some other shareholders that it would be very desirable to turn this company into one of limited liability, under the powers contained in the Companies Act, 1862. I have heard from Mr. Round, the chairman of the company, that all the directors concurred in thinking it would be desirable to turn this into a limited company, and one cannot be surprised that it was the wish of all parties to effect so desirable a *change, but they considered that it was necessary, [603 if such conversion was effected, to increase the capital of the company also. £17 having been paid upon each share, there remains only £3 to be called up, that is, £60,000, and that sum has already been borrowed upon debentures, so that in fact the whole capital of the company is exhausted for carrying on the business, and therefore it was stated that it would be necessary to have some capital to resort to, otherwise the public would lose confidence in the company, and they would not be able to carry on their business with the advantages they now have if it were known that every farthing of their capital was called up or expended. If I were to give my opinion as between the different views, I should say the view of the directors was a very reasonable view, and it is one which Mr. Moffatt and those who coincide with him would probably have concurred

in if they had gone into a discussion of the subject, and it probably would have resulted in some view half-way between the extreme views being adopted, and instead of turning the £20 share into £30, as the directors wished, which would have thrown upon Mr. Moffatt a liability of more than £30,000, upon Mr. Wythes £40,000, and upon Mr. Clive £20,000; possibly they might have adopted a middle course, and reasonably have said that the further liability should be £5 a share, which I am rather disposed to think would have been sufficient. However, no such course was taken, and the parties got angry, and in order to decide this mere dry point of law, what was the right of the directors to veto the transfer of shares, they have carried on the litigation to the utmost extent, and they even persisted in having a question of no importance decided as to who was the person to be sued. They chose to sue two directors, and I decided that they might sue either the secretary or one of the directors, and at last they selected Mr. Farquhar, who now stands as the representative of the company. All this litigation was very unreasonable and very useless.

Now, in this state of feeling, Mr. Moffatt finding that he had only twenty votes for his 3,031 shares, Mr. Wythes having no more than twenty votes for a still larger number, and Mr. Clive also being limited to twenty votes, amounting to no more than sixty votes among them, it occurred to Mr. Moffatt and the others that they were not properly represented upon any division of opinion, *and that by selling their shares, or transferring them to trustees for themselves, the power of voting might be increased. Accordingly Mr. Moffatt sold to Mr. Roger Eykyn, a gentleman well known to be of the highest respectability, a stockbroker, and formerly a member of Parliament, to whom it was impossible that any objection could be raised, 400 shares. It was suggested that this was not a *bona fide* sale, but a transfer by way of trust; but Mr. Eykyn was examined as a witness and swore that he desired to be a member of the company, and that he was ready to pay the money for the shares. I am bound, therefore, to take this as a *bona fide* sale of 400 shares at the price of £8 per share. Upon this sale taking place there was the usual notice given to the directors that Mr. Moffatt was desirous of transferring these shares to Mr. Eykyn, and he also gave them notice that he was desirous of transferring 400 other shares to Mr. R. Moffatt. The result of the evidence given by Mr. R. Moffatt is to show that he was not to pay for them, but to hold the shares in trust for his uncle, the plaintiff; therefore I have

a transfer of 400 shares for value at the full market price, and a transfer of 400 shares voluntarily to a trustee for the plaintiff, Mr. Moffatt.

To these transfers the directors have objected, and the only objection they raise is, not to the persons, because it is admitted by Mr. Round that there is no objection as to the fitness of the persons, but another objection is raised. Mr. Round says it was this—that the interest in the shares was not wholly parted with; but that objection, as regards Mr. Eykyn, entirely fails, because the evidence is all one way, and what Mr. Eykyn says is not attempted to be denied, and nobody will say that Mr. Eykyn was not as good a member of the company as they could desire to have. With regard to the other person, the reason for refusing the transfer was the same—that the interest was not wholly parted with, and to that extent they had some ground for their decision. But the real objection to the transfers has been, not to the fitness of the persons, but merely to the object with which the transfers were made; that is to say, the directors have thought fit to conjecture,—and they had no right to be guided by any such consideration—but they conjectured that the object of selling the shares to Mr. Eykyn and Mr. R. Moffatt was to get friendly transferees who *would [605 take the shares, and who would vote in accordance with the views of Mr. Moffatt himself.

The question therefore raised, and the only question that I have to decide, is, what is the power of the directors in vetoing or forbidding the transfer of the shares? Now that entirely depends upon the 82d clause of the deed of settlement of the company.

The only power which is given by that section to the directors of objecting to the transfer is as to the person of the transferee. If the person or persons proposed shall be approved of, then a transfer of the shares is to take place. In my opinion, therefore, it is perfectly clear there can be no justification for refusing the transfer unless they have an objection to the person of the transferee. That they should have such a power seems reasonable; because, this being a limited company, and it being very desirable that they should have respectable men and solvent men as members, and persons who would be able to pay the calls which should be made, it is reasonable that they should have the power of objecting to the person, and not have introduced among them insolvent persons, or, it might be, if you like, disagreeable persons who would throw them into confusion; and therefore the directors have the power of objecting to

the person. Certainly, there is, in my opinion, no other power of objecting to the transfer, and if, therefore, a proper transferee is proposed, I take it to be perfectly clear that the proprietor has a right to transfer his shares to whomsoever he likes, and the board has no right whatever to inquire into what the object of that transfer is.

Now this is most important; because here is a case, in which the nominal value of the plaintiff's shares in this company amounts to £80,000. This right of transfer is a right of property; and if the directors have an arbitrary power, from any fancy they choose to take up, to say there shall be no transfer, that is an annihilation of property. A man may have embarked too much in becoming a member of the company, and in a case of emergency he may require to sell his shares fairly in the market to a person of unexceptionable character; but if the directors have the power of vetoing the transfer because they conjecture there is some collateral object, the value of the property is diminished—the marketable value is gone; and therefore the transfer in 606] these *joint stock companies is a right of property, which right of property must not and cannot be lightly interfered with. Such are the views which have been taken in all the cases that have occurred. It is always treated as a matter of property; and where a matter of property is concerned it must not be lightly interfered with. That is distinctly pointed out in *Poole v. Middleton* (*). The point in that case was this: "It was provided by the deed of settlement of a joint stock company 'that no shareholder should be at liberty to transfer his shares, except in such manner as a board of directors should approve.' A shareholder contracted to sell his shares, and it was held that he was bound specifically to perform the contract, by the execution of a transfer, though the directors refused to allow it." In that case there is a passage that is very applicable to this case. Lord Romilly says (*): "But shares in joint stock companies which do not belong to any of the directors, are perfectly distinct from such cases; they are, in fact, in the nature of property, and according to the ordinary rule every person possessed of property has a right, by law, to dispose of it, except to the extent that he may be fettered by any contract which diminishes or derogates from that right. Therefore, unless there is something which prevents him from entering into such a contract, he has a right to dispose of his property in any share in a joint stock company, which is a right to receive the dividends."

(*) 29 Beav., 646.

(*) 29 Beav., 650.

Now, the board having been applied to to make these transfers, they passed the resolution which is set out in the statement of claim, and admitted by the statement of defence, and by which they say that having duly considered the proposals they do not approve of the same. The statement of claim alleges that the said resolution was passed by the directors, not in a *bona fide* exercise of their discretion or for the interests of the company, but solely for their own private purposes, and in pursuance of and to carry out their aforesaid determination; that the directors had not and never have had any grounds of objection to the proposed transferees personally, who were in every respect fit and proper persons to be proprietors of the shares in the said company proposed to be transferred to them. Then the defendants state what *their objection to the transfer [607 was. "At a meeting of the board of directors held on the 7th day of December, 1875, they duly considered the two last mentioned applications, and believing the said transfers to be intended merely as transfers in trust for the plaintiff." Why a man should not transfer his shares to a trustee for himself, I confess I am utterly unable to see. A man may say that on 3,000 shares there will be very heavy calls; if he got a person to stand in his place to hold them upon trust for him, why should not the man be at liberty to transfer his shares to a trustee in trust for himself as much as he would be to transfer any other property he had? A man has a right to transfer his personal estate of every description into the name of another person to hold it in trust for him, but these directors took this most extraordinary and, to my mind, most unjustifiable view, that they were transfers in trust for the plaintiff; and now comes the real objection: "And for the purpose of enabling the plaintiff to have the command of forty additional votes, they refused to approve of such transfers." The plaintiff afterwards inquired as to the reason for such refusal, and the directors stated that the decision they had come to was in the interests of the company.

The defendants state that the plaintiff had never alleged that the proposed transfers were on sales actually made in the ordinary course, and were not mere transfers in trust for the plaintiff.

In my opinion it is not necessary for him to deny that.

Now, that is the whole point between the parties. The plaintiff says he has an absolute right to transfer, provided the person is unobjectionable. The defendants say that they have a right to consider, first, whether that is a transfer in trust for the transferor, and, secondly, what the ob-

ject of the transfer was. My opinion is that they have no right whatever to inquire as to the object of the transfer, provided the transferees are persons who are unobjectionable, as they are admitted here to be; and they have attempted to usurp a power which certainly, in my opinion, does not belong to them.

A further objection was raised in argument, which I confess somewhat surprised me should be resorted to. It was said that this was not a joint stock company, but a private partnership. I think that Mr. Higgins has completely met 608] that point. Even if it *were a private partnership, the parties have agreed—and it is competent for them to do so—that a new partner shall be introduced without the consent of all the partners. It is no doubt very convenient, and I have seen it in many instances provided, that a partner shall have liberty to introduce a son, or a nephew, or some relative, and if his partner has agreed to do that, he is bound by it, because he has agreed that a new partner may be introduced without the consent of all the other partners.

The case of *Lovegrove v. Nelson*, which was mentioned to me this morning, and which is cited by Mr. Justice Lindley (¹), decided that if the partners agreed that one partner should bring in a new partner without the consent of all, that was just as binding upon them as if they were a public company.

This company describes itself as a company, and it has all the liabilities of a company. It is a public company, in which the shares are bought and sold by auction or otherwise, and in which the right of transfer has been exercised for thirty-five years, to a very great extent, and no attempt has been made to raise any objection to the transfers, except as to the person of the transferee, up to the present time.

Mr. Higgins is quite right in saying that by the deed of settlement this is a company, and it is so by their private act of Parliament obtained by the company itself, and by the definition in the 7 & 8 Vict. c. 110, under which act this very company was registered. The definition of a company in the 2d section of that act is this: "Every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners." This, therefore, beyond all doubt, to my mind, is a joint stock company, to which all

(¹) Lindley on Partnership, 8d ed., p. 719.

the provisions of the Joint Stock Companies Act are applicable.

Now, with regard to the principles which have been established by the numerous authorities that have been cited, the first one relied upon on the part of the plaintiff was the case of the *Stranton Iron Company* (¹), a decision of Vice-Chancellor Bacon. The very circumstances which existed in that case exist here. The shares were paid up in full. Here they are not quite paid up in *full. That is the [609 only difference. In the *Stranton Iron Company* the *Crédit Foncier* were the holders of a great number of shares; but as matters then stood in respect of those shares, at a meeting which was about to take place they could only have 100 votes. They desired to multiply their votes. They did not think that they had votes enough to represent their interest, and therefore a meeting having been called for the 28th of July, on the 23d of July the *Crédit Foncier* executed the nine transfer deeds mentioned in the form suggested by the articles of association of 100 shares each to nine persons, and on the same day the deeds were left at the company's office for registration with the share certificates, and the fees were paid, but shortly afterwards the deeds were returned by the secretary with a verbal message that under the circumstances he could not register the transfers. The transferees were the solicitors, and several clerks in the employ of the *Crédit Foncier*. A correspondence followed, but registration was refused; and this motion was made on Saturday, the 26th of July, the meeting being summoned for the 28th of July, the following Monday, and it was therefore of great importance to the *Crédit Foncier* that these transfers should be registered, otherwise they would only have the 100 votes which were limited to every shareholder. Vice-Chancellor Bacon said this (²): "In my opinion I cannot refuse to make the order which is asked. The applicants are the owners of shares—a class of property of which one of the incidents is a right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register that transfer, or to furnish some reason for refusing to transfer." Then he says that no ground whatever had been assigned which would excuse non-registration except a desire to exclude the applicants from the exercise of that which was their plain legal right, and he not only grants the application to have the shares registered, but directs them to be registered before

(¹) Law Rep., 16 Eq., 559; 7 Eng. R., 581.

(²) Law Rep., 16 Eq., 562; 7 Eng. R., 583.

the following Monday, when the meeting was to be held, on the ground that if the application were not granted in that shape the sole object for which the transfers were made would be frustrated. Now there the transfer was enforced, although the avowed object was to increase the voting power 610] in respect of the shares transferred. *Then, as to the case of *Robinson v. Chartered Bank* (1), the company refused to allow the transfer, but the court held, as it does in all these cases, that the company must exercise their power in a reasonable manner, and, there being no reasonable ground alleged there for refusing the transfer, they were compelled to allow it to take place.

There are other cases in which the directors have attempted to do the same thing. For instance, there is *Weston's Case* (2) in which the Lords Justices refused to allow an objection to the transfer, because the transferee was supposed to have given an erroneous address. The court held that he had given a sufficient address, and therefore they compelled the transfer to be made. In that case, which is a very important one, Sir William Page Wood, then Lord Justice, in stating his reasons, says this (3): "I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibility at any time they please by going into the market and disposing of and transferring their shares without the consent of directors, or shareholders, or anybody, provided only it is a *bona fide* transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited powers of assignment shall not exist, then a clause is inserted in the articles by which the directors have powers of rejection of members. *Shortridge v. Bosanquet* (4), which went to the House of Lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the Companies Act, 1862, in the 22d section, gives a power of transferring shares." Then he says: "It would be a very serious thing for shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable, and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles, and I may add that if we were to hold that such powers were vested in the directors, it would

(1) Law Rep., 1 Eq., 32.

(2) Law Rep., 4 Ch., 20.

(3) Law Rep., 4 Ch., 27.

(4) 16 Beav., 84; 5 H. L. C., 297.

be a very serious thing for them, and would *impose [611 upon them much more onerous duties than any which are really imposed upon them by this clause." That fully recognizes the right of every shareholder, in respect of his right of property, to transfer his shares fairly and without any restraint on the part of the directors.

The case of *Ex parte Penney* (*) appeared to me at first the case most strongly in favor of the contention of the defendants. However, upon looking at it, I think it will be found to be very distinguishable from this. The 17th clause—the one which affects the question—is this: "That subject to the provisions herein contained, and subject also to the provisions of the Joint Stock Companies Act, so long as the company shall be subject to the provisions of that act every shareholder shall be at liberty to sell and transfer his shares to any other person who shall already be a shareholder, or who shall have been approved of as such by the board of directors." The question was whether the directors had a right to prevent a transfer of shares to Mr. Penney, who was not yet a transferee, or to a person who should have been approved of as such by the board of directors. Therefore here there was power of objecting to the person, and the directors objected to the transfer to Mr. Penney. They did not state any reason, and therefore the court said, We must assume that the objection, which alone is the objection they are entitled to make, is an objection to the person of the transferee; but if they had given another reason—that Mr. Penney was to be trustee for the transferor—I think it is perfectly clear from what both Lords Justices said, they would not have considered that a valid objection to the transfer. If it had been avowed that it was not an objection to the person of the transferee, but that the transferor would vote in a particular manner after the transfer was made, it is quite clear, from all that fell from the Lords Justices, they would have considered that wholly unjustifiable. This is the passage which has been read (*) : "If the directors had been minded, and the court was satisfied that they were minded, whether they expressed it or not, positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose"—which is the condition *here that they are [612 to vote in accordance with their views—"the court would probably, in exercise of its duty as between the *cestui que trust* and the trustees, interfere to redress the mischief either by compelling the transfer or giving damages, or in some

(*) Law Rep., 8 Ch., 446.

(*) Law Rep., 8 Ch., 449, 461.

mode or other to redress the mischief which the shareholder would have had a just right to complain of." Lord Justice Mellish also says: "I am disposed to think, although it is not necessary distinctly to decide it in this case, that if it were made out that the directors were committing a breach of trust towards any one of their shareholders in refusing to allow him to transfer his shares for a purely arbitrary reason, that might be a ground why the court should interfere." Here I consider that the directors are refusing for a purely arbitrary reason. They choose to adopt a particular view as to the manner in which this company shall be converted from an unlimited to a limited company, and unless every shareholder will concur in their views they arbitrarily set up a standard upon which he is allowed to deal with property of this enormous value, and unless he concurs in their particular views no transfer is to be made. That is a contention which, in my opinion, cannot be set up in a court of justice, and it is wholly unsupported by any case that is to be found in the books. The case I have been referring to at first rather struck me, but upon looking at the reasons given by the court, I come distinctly to the conclusion that if such a reason as this had been before them, they would have decided as I am about to decide in the present case.

Those are the only cases of any importance to which it is necessary to refer, except the last case of *Pender v. Lushington* (¹), in which the present Master of the Rolls has, in effect, decided the very point which I am now called upon to decide, viz., that it is no objection to the transfer of shares, whether the object of the transfer is known before it takes place, as it was in the Stranton Ironworks case, before Vice-Chancellor Bacon, or whether when the transfers have been made it is ascertained that they were made for the purpose of multiplying votes—it is equally free from objection, and those who have obtained their right of voting in this manner cannot in any way be objected to.

613] *The case which gave rise to the decision in *Pender v. Lushington* (¹) was this, it was as to the United States Cable Company, Limited, of which Mr. Pender was a director. He took a particular view, and the other members of the board took another view, with regard to certain regulations of the company. Those that agreed with Mr. Pender found that they had not power enough to carry their view, because, though they held a larger number of shares, they were restricted as to the number of votes they could give. They, therefore, found it was impossible to carry

(¹) 6 Ch. D., 70; 22 Eng. R., 640.

their views unless they could multiply their votes, so they made numerous transfers for the very purpose of multiplying their votes. A public meeting having taken place they proceeded to vote, and the chairman who presided rejected the votes of all those whose shares had been transferred by shareholders taking the opposite view, on the ground that they had been transferred for the express purpose of multiplying votes. If that objection could have been sustained, then Mr. Pender was beaten, but if Mr. Pender could have the use of those votes, then his view was carried. That is the point that was brought before the Master of the Rolls upon the question whether these votes were properly rejected by the chairman as having taken place for the purpose of multiplying votes. A motion was now made on the behalf of the plaintiff, Mr. Pender, and those who sided with him, to restrain the defendants from ruling out the 649 votes—that is, rejecting 649 votes which had been obtained in the manner I have stated—until the hearing of the action. The Master of the Rolls felt no more doubt in that case than I do in the present. I confess I have not been able from the first hour this case was opened to bring my mind to the slightest doubt as to the conclusion at which I ought to arrive. The Master of the Rolls says⁽¹⁾: “In all cases of this kind where men exercise their rights of property they exercise those rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise.” I expressed my surprise that Mr. Round, a gentleman of experience, could have thought and advised this company that they had any right to object to this *transfer into the [614 name of Mr. Roger Eykyn; and Mr. Round founds his objection upon a conjecture, when he had no right to conjecture upon the subject at all, that the whole interest was not parted with, when it is laid down here⁽²⁾: “The result appears to be manifest that the company has no right whatever to enter into the question of the beneficial ownership of the shares. Any such suggestion is quite inadmissible; and therefore it is clear that the chairman had no right to inquire who was the beneficial owner of the shares, and the votes in question ought to have been admitted as good votes independently of any inquiry as to whether the parties tendering them were or were not, and to what extent, trustees for other persons beneficially entitled to the shares.”

Now, independently of the very strong views which I en-

(1) 6 Ch. D., 75; 22 Eng. R., 645.

(2) 6 Ch. D., 78; 22 Eng. R., 647.

tertain myself of the right of every shareholder in a joint stock company, as a matter of property, to protect that property from being interfered with, I have first of all the decision of Vice-Chancellor Bacon in *In re Stranton Iron Company* (1), that where the transfer was about to be made for the express purpose of multiplying votes—that transfer could not on that ground be refused; and I have also the very recent decision of the Master of the Rolls in *Pender v. Lushington* (2), that where the shares were transferred for the same object no objection could be made to the votes that were given in respect of those shares. So that I am warranted in coming to the conclusion, as I do most distinctly, that the objection raised by these directors to this transfer was without justification, and I am bound, therefore, to order that the transfers to Mr. Roger Eykyn and Mr. Robert Moffatt, in pursuance of the notice of the 29th of November, 1875, be made.

That, therefore, is the conclusion that I arrive at, and that will be the decree.

The consequence must be that the contest raised by the company fails. I have already said that Mr. Farquhar represents the company, and the result of it is that Mr. Moffatt must have his costs paid by the company.

Another very important question is raised whether there should be an inquiry as to damages. I do not know whether [615] it is *desired to press that. I should strongly desire that the litigation should stop here as far as I am concerned.

Jan. 28. The case was again mentioned. An offer to waive the inquiry was made on conditions, which were not accepted, and the Vice-Chancellor then directed an inquiry as to damages.

Solicitors for plaintiff: *Hollams, Son & Coward.*

Solicitors for defendant: *Freshfields & Williams.*

(1) Law Rep., 16 Eq., 559; 7 Eng. R., 581. (2) 6 Ch. D., 70; 22 Eng. R., 640.

See 7 Eng. R., 119 note; 7 Eng. R., 585 note; 13 Eng. R., 756 note; 18 Eng. R., 222 note.

If a corporation issues a certificate of shares in its capital stock upon the surrender of a former certificate for the same, accompanied by a transfer under a forged power of attorney, neither the person acting under such power, nor the person to whom the certificate is issued, is a necessary party to a bill in equity by the true owner against the corporation to compel it to procure a

like number of shares of its capital stock, to record and issue to him a certificate thereof, and to pay him the dividends thereon: *Pratt v. Boston*, etc., 126 Mass., 443.

If a certificate of shares in the capital stock of a corporation is taken without the owner's knowledge, and, together with a forged power of attorney, is delivered to an auctioneer for sale, to whom the corporation issues a new certificate in the name of the auctioneer, who delivers it to an innocent pur-

chaser for value, to whom, in turn, on its presentation, the corporation issues a new certificate, the owner is entitled, on a bill in equity against the corporation and purchaser, to a decree to compel the corporation to issue to him a certificate for his shares, and to pay him the dividends thereon, but not to a decree against the purchaser, and upon such a bill the court cannot decide unless by consent, whether the corporation is liable to the purchaser: *Pratt v. Taunton Copper Co.*, 123 Mass., 110.

A certificate of shares in the capital stock of a corporation was taken without the owner's knowledge, and, together with a forged power of attorney, delivered to a broker for sale. The broker employed an auctioneer, who sold the stock to a purchaser. The broker then sent the stolen certificate, with the forged power of attorney, to the corporation, requesting a new certificate in the name of the auctioneer. The corporation complied with the request, and the new certificate was sent to the auctioneer, who delivered it to the broker with a power of attorney, who in turn delivered it to the purchaser, to whom the corporation afterwards issued a new certificate. The broker, the auctioneer, the purchaser, and the corporation acted in good faith, and supposed the forged power of attorney to be genuine. The original owner then brought a bill in equity against the corporation, and obtained a decree ordering it to procure and transfer to the plaintiff the shares of stock, and to make and deliver a certificate of the same. The corporation thereupon issued a certificate for the shares in question, and thereby increased its capital stock. It then brought a bill in equity against the broker, the auctioneer and the purchaser, setting forth the above facts. Held, that the bill could not be maintained: *Machinists' National Bank v. Field*, 126 Mass., 345.

A municipal corporation is liable to a *cestui que trust* for an illegal transfer to a stranger of shares of its stock standing in the name of a trustee: *Wetzell v. Charleston*, 7 S. C., N.S., 88.

A bank is liable to a *cestui que trust* of its stock, standing on its books in the name of a trustee "in trust for" such *cestui que trust*, if it transfers the stock to a purchaser from the trustee

without the knowledge or consent of the *cestui que trust*—the trust being without power of sale, and the *cestui que trust* being an unmarried female of full age: *Magwood v. Railroad Bank*, 5 S. Carolina R., 379.

The officers of a corporation are the custodians of its books; and it is their duty to see that a transfer of shares of its capital stock is properly made, either by the owner himself, or by a person having authority from him. In either case, they must act upon their own responsibility. Accordingly, when the name of the owner of a certificate of stock had been forged to a blank form of transfer, and to a power of attorney indorsed on it, and the purchaser of the certificate in this form, using the forged power of attorney, obtained a transfer of the stock on the books of the corporation. Held, in a suit by such owner against the corporation, that he was entitled to a decree compelling it to replace the stock on its books in his name, issue a proper certificate to him, and pay him the dividends received on the stock after its unauthorized transfer, or to an alternative decree for the value of the stock, with the amount of the dividends. The negligence of their guardian cannot preclude minors from asserting, by suit, their right to stock belonging to them, which was so sold and transferred. If competent to transfer it, or to approve of the transfer made, they must, to create an estoppel against them, have by some act or declaration by which the corporation was misled, authorize the use of their names, or subsequently approved such use by accepting the purchase-money with knowledge of the transfer; but under the statute of Ohio, where the minors who are the complainants herein resided, they were not, nor, without the authority of the probate court, was their guardian competent to authorize a sale of their property: *Telegraph Company v. Davenport*, 97 U. S. Rep., 369.

If a corporation issues a certificate of stock to A. as trustee, and has notice of the name of the *cestui que trust*, and, on A.'s wrongfully transferring the certificate, issues a new certificate without making any inquiry, it is liable to the rightful owner, if he is injured thereby, without proof of fraud or collusion between the corporation and the

trustee. If a trustee has authority to sell personal property only with the consent of the *cestui que trust*, a married woman, and pledges a portion of the property without such consent, for his own debt, the invalidity of the transaction is not affected by the direction of the *cestui que trust* (not shown to have been acted on by the trustee) to pledge such portion for her benefit, or by the assent of the *cestui que trust* to a sale by the trustee of another portion of the trust property; and letters of her husband not proved to have been known to or authorized by her, cannot affect her rights.

If a trustee has, by the terms of the trust, authority only to pay the income to the *cestui que trust* as it accrues, and not by way of anticipation, he has no right to sell the trust property to reimburse himself for advances to the *cestui que trust*.

If a corporation issues stock to A., as trustee, and with knowledge of the name of the *cestui que trust*, issues a new certificate to one to whom the trustee has, in violation of the trust, transferred the stock, it is no bar to an action against it for the wrong done to the *cestui que trust*, that part satisfaction has been received from the trustee: *Loring v. Salisbury*, 125 Mass., 188.

No ratification of the acts of an agent or trustee will estop the principal or *cestui que trust*, unless he has been made aware of all the material facts and circumstances of the transaction that would in any way influence his mind or affect the transaction: *G. C. & S. R. R. Co. v. Kelly*, 77 Ills., 426.

Where one of two parties who are equally innocent of an actual fraud must lose, the one whose misplaced confidence in an agent or attorney has been the cause of the loss, shall not throw it on the other.

Where the owner of stocks intrusts the certificates with blank powers of attorney to an agent for safe keeping, who fraudulently transfers to a third party, who in turn, without knowledge of the fraud, has them transferred to himself, the owner cannot recover from the corporation for the loss.

A corporation is the trustee of its stockholders, and is bound to proper vigilance and care that they may not be

injured by unauthorized transfers of stock.

Where, therefore, the signatures to powers of transfers were genuine, yet it appearing that at the time the transfer was made they were thirteen years old, this fact should have put the corporation upon inquiry, and it was not justified in making the transfer, unless it had first ascertained if the powers had been revoked: *Penn. R. R. Co.'s Appeal*, 86 Penn., 80.

If W., being the owner of certain shares of the stock of a corporation, causes them to be transferred on the books of the company to M., to whom a certificate is issued in due form, and if M. thereupon indorses the certificate in blank, and delivers it to W., from whom, while so indorsed in blank, and while M. still stands on the books of the company as the registered owner, the certificate is subsequently stolen by M., who puts it on the market, and it is purchased in the usual course of business, in good faith and without notice by a third person, the purchaser will acquire a valid title to the stock as against W.: *Winter v. Belmont*, etc., 53 Cal., 428.

The general rule is that stock of a corporation, except as between the parties, can only be acquired by transfer upon the books of the corporation.

Connecticut: *State v. Ferris*, 42 Conn., 560.

Nevada: *State v. Pettinelli*, 10 Nev., 141.

United States: *Brown v. Adams*, 5 Bissell, 181.

The rule is otherwise in,

Canada, Upper: By statute, *Crawford v. Provincial*, etc., 8 U. C. C. Pl., 263.

A corporation which refuses to register and perfect a transfer of stock in the name of a vendee thereof, is liable in a suit at law for damages for such refusal:

Canada, Upper: *McMunich v. Bond*, etc., 9 U. C. Q. B., 333.

Massachusetts: *Murray v. Stevens*, 110 Mass., 95, 96.

Nevada: *State v. Guerrero*, 12 Nev., 105, 107.

And so, in a proper case presenting special equities, a suit in equity:

New York: *Cushman v. Thayer*, etc., 53 How. Pr. Rep., 60, affirmed 7 Daly, 330, and cases cited, pp. 331-2, af-

firmed by Court Appeals, 19 Alb. L. J., 259; *Buckmaster v. Consumers, etc.*, 5 Daly, 313; *White v. Schuyler*, 1 Abb. Pr., N.S., 300, 31 How. Pr., 38; *Midlebrook v. Merchants, etc.*, 41 Barb., 481, 18 Abb. Pr., 109, 27 How. Pr., 474, affirmed 3 Abb. Court App. Dec., 295.

An action or bill in equity may be maintained against a corporation, on behalf of a holder of its stock, to compel a transfer to him by the company on its books.

A court of equity, in a proper case, may decree the transfers of shares of stock on the books of the company. The customary action by a party injured by the refusal of a corporation to make transfer to him, is an action at law for damage, in which he is entitled to recover its full market value.

But where the shares of the capital stock of a corporation have no market value upon which an assessment of damages in an action at law could be based, their value depending upon the future operations of the company having it in their power to suspend its operations *in toto*, so as to make the stock of no value, and thus decrease the law damage to a mere trifle, the capital stock being limited and not easily, if at all, procurable in the market, the transfer of the stocks owned by plaintiff being effected in fraud of her rights by her husband and one Beales, the transferee, and made on the books of the company by the officers of the company in bad faith, the original certificates not being produced nor properly accounted for, and the transfer being made to one of the officers of the company:

Held, that the equitable power of the court may be invoked and the company compelled to transfer the shares of stock to plaintiff on their books: *Cushman v. Thayer, etc.*, 53 How. Pr., 60, affirmed 7 Daly, 330, affirmed in Court of Appeals, 19 Alb. L. J., 259.

In some of the states it is held that a mandamus will not lie to compel a corporation to transfer its stock to a transferee thereof:

Massachusetts: *Murray v. Stevens*, 110 Mass., 95.

Nevada: *State v. Guerrero*, 12 Nev., 105.

New Brunswick: *Matter of Watson*, 3 Pugsley, 600.

New York: *Cushman v. Thayer*, 7 Daly, 332, and cases cited; *Shipley v. Mechanics, etc.*, 10 Johns., 484; *Ex parte Fireman's, etc.*, 6 Hill, 243.

In others, that such a writ will be awarded:

Canada, Upper: *Goodwin v. Ottawa, etc.*, 12 U. C. C. Pl., 254.

Indiana: *Green Mount, etc., v. Bulla*, 45 Ind., 1.

In which case the writ may be directed to the company without naming the officers: *Goodwin v. Ottawa, etc.*, 12 U. C. C. Pl., 254; *Norris v. Irish, etc.*, 8 Ellis & Bl., 512.

Stock issued in violation of law under which the company is incorporated is illegal and void, and the corporation cannot be required to transfer the same upon its books, notwithstanding it may have been issued with the consent of all the stockholders of the company at the time: *People v. Sterling*, 32 Ills., 458.

If the directors of a railway company gratuitously give away certificates of stock, being a major part thereof, to contractors building the road, for the purpose of giving them a controlling influence in the election of officers and the management of the road, a court of equity will declare the same void, especially where a part of the directors are interested in the contract with the contractors: *G. C. & S. R. R. Co. v. Kelly*, 77 Ills., 426.

If one subscribe to the capital stock of a corporation, for and in the name of another without authority, he thereby binds himself, and becomes the equitable owner of the stock. A transfer thereof from the person in whose name the subscription is made, is not necessary; it is sufficient if the stock be carried to the account of the subscriber on the stock ledger of the company: *State v. Smith*, 48 Verm., 266.

An insolvent corporation cannot purchase in a portion of its capital stock so as to relieve a delinquent stockholder from payment of assessment upon his stock, especially against the objection of another stockholder. If it so deal, and can do so without prejudice to creditors, with one, it must with all: *Currier v. Lebanon, etc.*, 56 N. H., 262.

A *bona fide* subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another who has requested

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such stock to be subscribed for, is valid : *Davidson v. Grange*, 4 Grant's (U. C.) Chy., 377.

For a case in which it was held that the purchase by a corporation of its own stock did not prevent its selling the same, see *State v. Smith*, 48 Verm., 266.

Where new stock is issued that is to share in profits with existing stock, all holders of the latter have an equal right to subscribe for their proportionate part of the new stock ; but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the payment of liabilities or for the general benefit : *State v. Smith*, 48 Verm., 266.

An agreement between divers stockholders of a corporation who, together, own a majority of all the shares of the capital stock of said corporation, entered into for the purpose of the election of directors who would manage the affairs of the company in the interest of the stockholders, and thus improve the value of their stock, is not in conflict with the requirements of law, and in no way derogates from its policy. There is nothing in it that tends to frustrate or interfere with the legal right of a majority of stockholders to delegate to directors of its own choice the management of the affairs of the company.

(The following cases relating to this subject reviewed : *Fremont v. Stone*, 42 Barb., 170 ; *Guernsey v. Cook*, 120 Mass., 501 ; *Cord v. Hope*, 2 B. & C., 661.)

Nor is an agreement made between a like number of stockholders, in regard to holding their stock and selling the same together, invalid and in contravention of public policy and law.

The measure of damages for a breach of such an agreement as the latter, would be the amount of any depreciation in the fair cash market value of the stock occasioned by such breach. A charge from the judge that substantially withdrew from the jury any discretion as to the determination of that depreciation in their assessment of damages, held to be error. *Havemeyer v. Havemeyer*, 43 N. Y. Supr. Ct., 506.

If a sale of stock by a corporation is otherwise valid, it is not vitiated by the fact that the motive of some of the directors and of the purchasers was to enable the latter to vote upon the stock

in a certain manner at an approaching election of directors : *State v. Smith*, 48 Verm., 266.

Where the board of directors of a corporation, in issuing new stock to the shareholders generally, refuse to issue to a particular stockholder his due proportion thereof, he may compel its issue to him by suit in equity against the corporation (at least, as long as there is sufficient stock remaining undisposed of) ; though he might probably have maintained an action at law against it for damages.

If there are other shareholders in like condition with the plaintiff, in such a case their right, and his, are several, and he has no right to represent them.

Where the complaint in such a case alleged that the new issue of stock had been actually made, and prayed for a corresponding issue to the plaintiff, and the proof was that only a very small amount had been issued, the judgment, instead of following the prayer, restrains the corporation from issuing any more of the new stock unless it shall issue a proportionate amount to the plaintiff. There being no bill of exceptions, and it not appearing that any injustice is done defendant by the form of the judgment, it is affirmed : *Dousman v. The Wisconsin, etc.*, 40 Wisc., 418.

Mandamus is the proper remedy to compel inspectors, appointed to hold the election for directors of an incorporate company, to receive and count the votes by proxy, of policy holders of the company, which have been rejected without sufficient reason. The duties of such inspectors are purely ministerial, not judicial or deliberative. A return to an alternative mandamus should set forth the facts *in extenso*, to enable the court to determine the law, not inference, or conclusions, nor should a return be evasive, argumentative, multifarious, or ambiguous. A by-law adopted by the board of directors, attaching conditions to the right to vote by proxy not required by the charter, is void, if done without consent or notice to policy holders : *Ceruth v. Coxe*, 1 Leg. Chron. Rep., 89.

The provisions of the Revised Statutes (1 R. S., 604, § 8) declaring that if the election of directors of an incorporate company shall not be duly held on the day designated, "it shall be the

duty of the president and directors * * to notify and cause an election for directors to be held within sixty days," applies to corporations organized under the general manufacturing act.

The provisions of said act (§ 4, chap. 40, Laws 1848) declaring that if an election of trustees shall not be had on the day designated by the by-laws of the corporation, it shall be lawful on any other day to hold an election "in such manner as shall be provided for by the said by-laws," does not conflict with the provision of the Revised Statutes; and the fact that no provision is made by the by-laws for any other than the annual election does not prevent such an election from being held. In case the proper officers of a manufacturing corporation refuse to perform the duty so imposed upon them, a stockholder has a remedy by mandamus to compel such performance: *People v. Cummings*, 73 N. Y., 433.

The service of the alternative writ of mandamus upon the president of a corporation, held sufficient in this case. The better practice is to serve each individual trustee. It is not necessary that a demand for an annual election of trustees should be made upon the board of trustees when in session; a demand upon each individual trustee of the corporation is sufficient.

A mandamus directed against the individual trustees constituting the board of trustees of a corporation is virtually the same as if directed against the board of trustees, and is sufficient. The verification of a petition for mandamus in the form of a jurat to ordinary affidavits is sufficient.

To entitle a party to intervene in proceedings for a writ of mandamus, it must be shown that the applicant would either gain or lose by the direct legal operation or effect of any decision that might be rendered. Before relator can obtain the writ of mandamus, he must establish sufficient facts to show that he has a legal right to have something done by respondents which they have refused to do.

The relator should not be compelled, in an application for mandamus, to contest his rights against third persons; the investigation should be limited to such facts as are necessary to determine the rights of the parties properly before the court.

Where relator asks that an annual election of trustees shall be held as provided by law, and comes into court the apparent owner of the stock in his possession, and the respondents admit that he paid the assessment thereon as levied by them, and that at his request they issued to him the identical stock presented in court, he has shown such an interest in the stock against respondents as entitles him to the writ of mandamus. The legal right to have an annual election of trustees of a corporation as required by law (Stat. 1875, 68) belongs to any stockholder, independent of the number of shares of stock owned by him.

The mere fact that an action or proceeding will lie, does not necessarily supersede the remedy by mandamus. The relator must not only have a specific, adequate, and legal remedy, but it must be one competent to afford relief upon the very subject-matter of his application: *State v. Wright*, 10 Nev., 187.

A notice of the day, hour, and place of the annual meeting of the stockholders of a corporation to elect a board of trustees, must be given, or such meeting cannot legally be held, unless the stockholders are all present and consenting, either in person or by proxy.

The fact that one of the by-laws of the corporation fixes the day upon which such meeting shall be held, is not a sufficient notice of the time and place at which the meeting will be held: *San Buenaventura v. Vassault*, 50 Cal., 534.

Under the provisions of the statute providing for the incorporation of benevolent, charitable, and missionary societies, the terms of office of trustees terminate upon the expiration of the year for which they are elected, and they do not, in the absence of a special provision in the constitution or by-laws, hold over until their successors are elected.

Where a corporation duly organized and existing has, for several years, failed to elect trustees, and there is no provision authorizing those formerly elected to hold over until their successors are chosen, or requiring the trustees or other officers to preside at, or do any act in relation to, the election, it is within the power of the corpora-

tors themselves, without any new legislative aid, voluntarily to meet at the time designated in the constitution and elect a new board of trustees: *People v. Twaddell*, 18 Hun, 427.

The general rule is, independent of statute, that it requires a majority of all the incorporators present to elect an officer: *State v. Fagan*, 42 Conn., 32.

Where it was provided that an officer should be elected by a majority of all the members present, it was held that a majority of all the votes cast was necessary to an election, and that the number of ballots would be taken to indicate the number of lawful voters present: *State v. Fagan*, 42 Conn., 32.

Where a person having received but 46 out of 97 ballots cast, was declared elected by the chairman of the meeting, and, on objection being made, the decision of the chair was sustained by the meeting with but few dissenting voices, it was held that this did not make it an election: *State v. Fagan*, 42 Conn., 32.

At an adjourned meeting, it was voted to correct the record of the first meeting, which stated an election, so as to make it show that there was no election and to proceed to elect, by ballot, to fill the vacancy. Such an election was had, and a person received a majority of the ballots cast. Held to be a valid election, and that when it was made the former incumbent ceased to hold over: *State v. Fagan*, 42 Conn., 32.

The statute incorporating a savings institution required the vote of a majority of the trustees present for the election of an officer. At a meeting of its trustees for the election of a president, twelve trustees were present. Six votes were given for the relator, four for the defendant, one for another person, and one trustee cast no vote. Held, that there was no choice.

The defendant, having been a director of a bank of discount and deposit which had become insolvent, and though not formally dissolved, was in the hands of a receiver, appointed under a new law, requiring him to convert the assets of the corporation into cash, and providing for their division among its creditors and stockholders, and, consequently, having ceased to perform the duties of a director: Held, that from having allowed himself to be voted for, as trustee of a savings institution, the

charter of which provided that no director or officer of any bank of circulation or discount and deposit should be eligible to act as trustee or officer of the corporation thereby created, he might be presumed to have resigned his position as a director of the bank: *People v. Conklin*, 7 Hun, 188.

A bankrupt, in whose name stock stands on the books of the corporation, may vote thereon with the assent of his assignee in bankruptcy: *State v. Ferris*, 42 Conn., 560.

Where an application is made under 1 R. S., 603, section 5, to settle contests arising out of a disputed election, the court may go behind the entries in the transfer book of the company, and determine whether a transfer appearing thereon was a sale or only a pledge of the shares, and whether the pledgor or pledgee was entitled to vote thereon: *Strong v. Smith*, 15 Hun, 222, considering many cases under the statute.

Where, at an election of directors of an incorporated benevolent society, the only objection made was to the right to vote by proxy, it was held on *quo warranto* against the directors elected, in the absence of proof that the persons executing the proxies were members of the society, or that the proxies were properly executed, that it would be presumed that the proxies were regular and proper: *People v. Crossley*, 69 Ills., 195.

Unless authorized by the statute, or by-laws passed pursuant to a statute, the stockholder cannot vote by proxy: *People v. Twaddle*, 18 Hun, 427.

But where the statute authorized the corporation to elect its "directors or managers at such time and place and in such manner as may be specified in its by-laws," a by-law authorizing its members to vote at all elections in person or by proxy is valid: *People v. Crossley*, 69 Ills., 195.

Where the by-law of a corporation provide that meetings of the stockholders shall be called by the trustees; held that the action of the board of trustees is necessary in order to convene a legal meeting, and that the president of the corporation has no authority to call such a meeting. At a meeting of all the stockholders, where only a portion of the stockholders participated in the election of trustees, where the president, although present, did not pre-

side; where no president *pro tempore* was chosen, and where no person who participated in the proceedings was authorized to receive the ballots or declare the result; held that there was no legal election: *State v. Pettinelli*, 10 Nev., 141.

A court of chancery has jurisdiction to set aside an election of directors of a corporate body by persons who are subscribers nominally, and not *bona fide*: *Davidson v. Grange*, 4 Grant's (U. C.) Chy., 377.

Some cases hold that the court of chancery has the equitable power to entertain a bill to set aside an improper election, and to order a new election, and that the party is not compelled to resort to the writ of mandamus. See quite an elaborate article on this subject, 3 Southern Law Review (N.S.), 211.

Canada, Upper: *Tully v. Farrell*, 13 Grant's Chy., 49; *Cowan v. Wright*, 23 Grant's Chy., 616; *Davidson v. Grange*, 4 Grant's Chy., 377.

As to equitable suit to set aside the election of a church-warden, see *Tully v. Farrell*, 23 Grant's (U. C.) Chy., 49; *Cowan v. Wright*, 23 Grant's (U. C.) Chy., 616.

As to mandamus to compel recognition in such case, *Miller v. Esebback*, 48 Md., 1.

For a case where a suit in chancery was instituted, charging fraud in the election of directors of a corporation, followed by a *quo warranto*, see *Ogden et al. v. Kip et al.*, and *People ex rel. Ogden v. Kip*, 1 U. S. Law Journal, 283-294, Court of Chancery and Supreme Court of New York.

A suit for the purpose of setting aside an election of directors of a corporation on the alleged ground of fraud, may be brought on behalf of some of the shareholders on behalf of all, and need not be in the name of the corporation itself: *Davidson v. Grange*, 4 Grant's (U. C.) Chy., 377.

[7 Chancery Division, 615.]

V.C.M., Feb. 2, 1878.

In re KEARLEY AND CLAYTON'S CONTRACT.

Vendor and Purchaser Act, 1874—Vendor's Liquidation in Bankruptcy—Composition—Evidence of Payment of Instalments.

A debtor who has filed a petition for liquidation in bankruptcy and has effected a composition with his creditors, has complete dominion over his property, and full power to dispose of it until, upon action taken by his creditors under the Bankruptcy Act, 1869, s. 126, the composition has been set aside and the debtor adjudged a bankrupt; and a purchaser from him is not bound to inquire as to the payment of instalments under the composition.

[7 Chancery Division, 620.]

V.C.M., Feb. 7, 1878.

*MANSON V. THACKER.

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[1874 M. 12.]

Vendor and Purchaser—Misrepresentation—Compensation—Completion of Purchase—Execution of Conveyance.

A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance.

Bos v. Helsham (!) considered.

(!) Law Rep., 2 Ex., 72.

THIS was an application by the purchaser of property known as Norway Wharf, Bermondsey Wall, sold under a decree in these suits, for compensation in respect of the ex-621] istence of an under *ground culvert not discovered by the particulars of sale, through which certain third parties had a right to the flow of water.

The property was sold by public auction under the decree made in the suit, for £4,960. In the particulars of sale the property was described as "available" as a building site for a warehouse or granary, and the 16th condition of sale provided "that if any error or misstatement should appear to have been made in the above particulars, such error or misstatement was not to annul the sale or to entitle any purchaser to be discharged from his purchase, but compensation was to be made to or by the purchaser, as the case might be, and the amount of such compensation was to be settled by a judge at chambers."

The title was investigated on behalf of the purchaser and was accepted by him, and in due course he paid his purchase-money into court, and took his conveyance in February, 1877.

Evidence was given that on July 1, 1877, the purchaser (for the first time, as he stated) discovered the culvert, and found afterwards that he had no right to interfere with it.

On the 9th of July the purchaser's solicitors gave the plaintiff's solicitors notice of his claim for compensation, and required them not to proceed with the distribution of the purchase-money under a decree which had been made in the suit. Evidence was given that the diminution in value, owing to the existence of the culvert, was estimated at £865.

The evidence proved that the mouth of the culvert was only visible at low water.

A summons was taken out, before the Vice-Chancellor in chambers, for compensation, but his Lordship dismissed the summons, and the case now came on upon an adjourned summons.

Higgins, Q.C., and *Laing*, for the purchaser: In this case the purchaser is entitled to compensation, notwithstanding the completion of the purchase. He would have been entitled to rescind in the absence of the condition, *Caballero v. Henty* (*); *Shackleton v. Sutcliffe* (*); and *King v. Wilson* (*); and where there has been material misde-622] scription the completion of *the purchase is no bar

(*) *Law Rep.*, 9 Ch., 447; 9 *Eng. R.*, 543.

(*) 6 *Beav.*, 124.

(*) 1 *De G. & Sm.*, 609.

to compensation: *Cann v. Cann* ("); *Bos v. Helsham* ("). The purchase-money being in court, compensation can be paid out of it.

Caballero v. Henty (") shows that specific performance could not be enforced: *Shackleton v. Sutcliffe* ("); Dart's Vendors and Purchasers ("); *Newcomin v. Coulson* (V.C.M. Jan. 18, 1877); Gale on Easements (").

J. Pearson, Q.C., and *Whitehead*, for the vendors: Right to compensation is gone after execution of conveyance: *Legge v. Croker* ("). The purchaser ought to have discovered this defect. It was his duty to make every inquiry before completing: *Wilde v. Gibson* ("); *Hart v. Swaine* ("). If this was an objection, it has been waived.

Glasse, Q.C., and *Macnaghten*, for defendants in the suit.

Higgins, in reply: There may be compensation after conveyance where the question is one of parcels and subject-matter only, for as to these a purchaser need not inquire: *Cann v. Cann*; *Cooper v. Cooper* ("); *Bos v. Helsham*.

In *Lane v. Flower*, before your Lordship on the 1st of June, 1876, your Lordship held that a purchaser ought to make inquiries as to the subject-matter, but the Court of Appeal took a different view.

In *Thomas v. Powell* (") there was a mere question of title, as to which, in the absence of fraud, there must be an end of the matter when the title is accepted.

Lord St. Leonards, in his Vendors and Purchasers ("), remarks on the above cases and on *McCulloch v. Gregory* (").

[MALINS, V.C., referred to *O'Kill v. Whittaker* ("), where the *vendor sought to obtain an additional price on [623 the ground that twenty years of his lease were unexpired, and not eight only, as had been supposed, but no relief was given.]

We contend that a misrepresentation as to the subject-matter differs from a misrepresentation as to title, and that we are entitled to compensation.

MALINS, V.C., after stating the facts, continued:

I apprehend that upon every principle the purchaser, having investigated the title and looked at the property, must be taken to have been satisfied. I do not express any

(1) 8 Sim., 447.

(2) Law Rep., 2 Ex., 72.

(3) Law Rep., 9 Ch., 447; 9 Eng. R., 543.

(4) 1 De G. & Sm., 609.

(5) 5th ed., p. 662.

(6) 5th ed., p. 645.

(7) 1 Ball. & Bea., 506.

(8) 1 H. L. C., 605.

(9) *Ante*, p. 42.

(10) 4 Ir. Ch. Rep., 75.

(11) 2 Cox, 394.

(12) Page 551.

(13) 3 Eq. Rep., 495.

(14) 2 Ph., 338.

opinion as to whether he might not have been entitled to compensation, or even to rescind his contract, if he had discovered the culvert before he completed his purchase. But the purchaser here has had ample opportunity of examining the property, for there was no concealment, and he ought to have discovered this defect before he completed his purchase. If this power to claim compensation is to be carried on indefinitely, it will follow that a vendor will never be discharged from liability; he will always be liable to pay compensation after he may have applied the purchase-money for other purposes. Nor are the cases in favor of the purchaser. Even *Thomas v. Powell* (*) is against him, where the purchase-money had not been appropriated, the sale having been under a decree; and I take it to be clear that even if the purchaser had been evicted from the whole estate the decision would have been the same. If, then, the court will not relieve when the whole estate is lost, it surely will not give compensation for a defect. Lord St. Leonards, in his *Vendors and Purchasers* (*), says that if the conveyance has been executed the purchaser cannot recover his purchase-money, either at law or in equity; and Mr. Dart and the other authorities are to the same effect.

It is true there is some doubt arising from the case of *Cann v. Cann* (*), decided by Vice-Chancellor Shadwell, a very experienced property lawyer; but that case, in my opinion, can only be supported on the ground that the representation, which turned out to be untrue, ought never to have been made by the vendor, and amounted, in the view of the court, to a species of fraudulent misrepresentation. In *Bos v. Helsham* (*) the court decided that a misrepresentation as to rental was a proper subject of compensation, though not discovered until after the execution of the conveyance. But there, also, the vendor was, in the opinion of the court, guilty of a fraud. No doubt the judges, in their judgments, considered that the condition as to compensation applied to errors discovered after, as well as before, the completion of the purchase. But that, in my opinion, is not the law of this court; and, with all respect to those judges, I must hold that the same view would not have been taken in this court.

In *Legge v. Croker* (*) a right of way was discovered over leased property after the execution of the lease, and the de-

(*) 2 Cox, 394.

(*) 14th ed., p. 549.

(*) 3 Sim., 447.

(*) Law Rep., 2 Ex., 72.

(*) 1 Ball. & Bea., 506.

cision was that the claim for relief was too late, although the lessor had stated that there was no such right of way.

The other cases which were cited by Mr. Higgins, *Caballero v. Henty* ('), *Shackleton v. Sutcliffe* ('), and *King v. Wilson* ('), were cases of objection to the title before completion, and have no application to this case.

In *Lane v. Flower*, heard before me on the 1st of June, 1876, Mr. Beyfus, a gentleman of great experience, and frequently in the habit of buying property, purchased at an auction a house stated in the particulars to be let at £33 per annum at about ten years' purchase. It was not stated in the particulars that the house bringing £33 per annum was let only on weekly tenancies; so that the purchaser would have to pay taxes which the tenants, if they had been yearly tenants, would have had to pay; and it was stated, as to other lots, that they were held on weekly tenancies. Mr. Beyfus claimed compensation, on the ground of the property he had purchased being held on weekly tenancies; but I refused him any compensation, on the ground that he might have found out the truth at the time, and also because an offer had been made by the vendor to put Mr. Beyfus in the same position as if the mistake had not been made. Subsequently the matter was taken *to the Court of [625 Appeal, and the judges adopted the view that compensation ought to be given, but no decision was given, as the parties came to a compromise. That was a case, however, where the mistake was discovered before the conveyance was executed, and has no application here. No doubt, if there has been a fraudulent misrepresentation on the part of the vendor there may be compensation, even after completion. Thus, in *Hart v. Swaine* ('), before Mr. Justice Fry, where there was legal fraud, that vitiated the whole transaction. Here fraud is not charged. I must dismiss the motion with costs.

Solicitors: *Parker & Clarke; Thomas D. Francis; Burton, Yeates & Hart.*

(1) Law Rep., 9 Ch., 447; 9 Eng. R., 543.

(2) 1 De G. & Sm., 609.

(3) 6 Reav., 124.

(4) *Ante*, p. 42.

See *ante*, 220 note.

This case does not proceed upon the theory that the seller was guilty of a fraudulent misrepresentation. It is well settled that although the agreement between the parties be reduced to writing, the party injured by *fraud* of the other may show such fraud, notwithstanding the written agreement, and may recover

therefor: 12 Eng. Rep., 24 note; Hall v. Erwin, 66 N. Y., 249, 60 Barb., 349, 384, modified 57 N. Y., 643.

See *Murray v. Dake*, 46 Cal., 644; *Wharton v. Douglass*, 76 Penn. St. R., 273.

The execution and delivery of a deed, pursuant to an executory contract for the sale of land, does not necessarily

extinguish a covenant in such executory contract not performed by such deed: *Witbeck v. Waine*, 16 N. Y., 532; *Bennett v. Abrams*, 41 Barb., 620, 625; *Lord v. Vreeland*, 24 How. Pr. R., 316, 317; *Silliman v. Tuttle*, 45 Barb., 177; *Clute v. Jones*, 28 N. Y., 280, 284; *Atwood v. Norton*, 27 Barb., 638; *Mott v. Coddington*, 1 Rob., 267, 1 Abb., N.S., 290, 296-8; *Doty v. Martin*, 32 Mich., 462, 466-7; *McLennan v. Cheguin*, 37 U. C. Q. B., 301; *Blossom v. Griffin*, 13 N. Y., 569; *Parker v. Child*, 25 N. Jer. Eq., 41.

Contracts for the sale of land are, in their nature, executory; and generally the acceptance of a deed, in pursuance of a contract, is *prima facie* an execution thereof, and the rights and remedies of the parties are to be determined by the deed, and the agreement thenceforth becomes void and of no further effect. But parties may enter into covenants collateral to the deed; and cases may arise in which the deed would be regarded as only a part execution of the contract, where the provisions of the two instruments clearly manifest such to have been the intention of the parties: *Bull v. Willard*, 9 Barb., 641.

It frequently becomes a nice and difficult question to determine whether covenants contained in an agreement for the sale of land, are collateral to those providing for the execution of the deed, or are so connected with it as to be at an end, and become merged or satisfied in the execution of the deed: *Bull v. Willard*, 9 Barb., 641.

The true criterion upon that question is, that the covenant, in order to be deemed collateral and independent so as not to be destroyed by the execution of the deed, must not look to, nor be connected with, the title, possession, quantity or emblements of the land which is the subject of the contract. If it does so, the execution of the deed, in pursuance of the contract, will not operate as an extinguishment of it: *Bull v. Willard*, 9 Barb., 641.

Where a deed has been given in pursuance of a preliminary contract for the sale of land, containing stipulations of which the conveyance itself is not a performance, it is a question of intention whether the parties have surrendered those stipulations: *Morris v. Whitcher*, 20 N. Y., 41.

In the absence of all proof, there is

no presumption that either party intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction: *Morris v. Whitcher*, 20 N. Y., 41.

A stipulation in the executory contract that the vendor should retain possession for a specific period, held, not merged in or extinguished by the conveyance, but admissible in evidence to qualify its operation, and to defeat an action for the possession by a subsequent grantee with notice: *Morris v. Whitcher*, 20 N. Y., 41.

All agreements relating to the purchase and sale of land are merged in the deed, unless the contract clearly manifests a different intention. This includes the implied contract of title: *Canaday v. Stiger*, 35 N. Y. Superior Ct. Rep., 423, affirmed 55 N. Y., 452.

A deed of lands contracted to be sold by an executory contract to the extent of the grant, extinguishes the conditions in the executory contract: *Davis v. Lottich*, 46 N. Y., 393, 397, distinguishing cases.

Where a house on land agreed, by an executory contract, to be conveyed is burned, and the vendee subsequently accepts a deed of the land, with knowledge of the loss, all right of indemnity which he might otherwise have had is extinguished: *Paine v. Miller*, 6 Ves. Jr., 349; *Mott v. Coddington*, 1 Abb. Pr. R., N.S., 298.

In cases where the clause in the agreement stipulating that the tract contains a certain number of acres is omitted in the deed, no action will lie on the agreement for deficiency in quantity: *Houghtaling v. Lewis*, 10 Johns., 297; *Long v. Hartwell*, 84 N. J. Law, 122.

Default having been made by the purchasers in performing the conditions of a contract for the sale of lands, a new contract was entered into between the parties for the sale of the same lands, and left *in escrow* to take effect on the payment of a sum of money the next day; held, that the second contract, although conditional, superseded the first, and that the condition not having been performed, neither contract could be enforced: *Price v. McGown*, 10 N. Y., 465.

The general rule is, that acceptance of a deed for land is to be deemed full execution of an executory contract to

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convey : Long v. Hartwell, 84 N. J. Law, 116 ; Rowley v. Flannelly, 30 N. J. Eq., 612 ; Dinsmore v. Shackelton, 26 U. C. Com. Pl., 604, 611, 612 ; Clare v. Lamb, 12 Eng. R., 399, 403-6.

Covenants collateral to the deed are exceptions to this rule : Long v. Hartwell, 84 N. J. Law, 116, 123-4.

Also, where the stipulation is to do a series of acts at successive periods, or distinct and separable acts to be performed simultaneously, the executory contract becomes extinct only as to such parts of it as are covered by the conveyance : Long v. Hartwell, 84 N. J. Law, 116, 123-4.

Another exception is where the title is not in the vendor but in a third person, who at the request of the vendor conveys the land to the vendee : Doty v. Martin, 32 Mich., 462.

So where the vendor deeds to a person other than the vendee at request of the latter : McLennan v. Cheguin, 87 U. C. Q. B., 301, 305 ; Ansell v. Baker, 15 Q. B., 20 ; Price v. Moulton, 10 C. B., 561, 573.

So where the vendee accepts a deed, conveying less than he is entitled to,

under a mistake or through the fraud of the vendor : Rowley v. Flannelly, 30 N. J. Eq., 612, 614 ; Conover v. Wardell, 20 N. J. Eq., 266, 271-4.

December 11, 1873, Richards and wife executed a bond and mortgage to one Lobenstein who, on the 18th, assigned it to Richards' wife, Caroline Richards. On January 21, 1874, Richards and wife conveyed the premises by a deed in the usual form to defendant's grantor, the husband alone joining in the warranty. At the same time the husband gave to the grantee an agreement in writing to pay off the mortgage. On May 28, 1874, Caroline Richards assigned the bond and mortgage to this plaintiff, who brought this action to foreclose the same.

Held, that the wife by joining in the deed did not release the premises from the lien of the mortgage then owned by her : Van Amburgh v. Kramer, 16 Hun, 205.

For a case in which the grant was held not to be made in pursuance of an executory contract, see Davis v. Lottich, 46 N. Y., 393, 397, distinguishing cases.

[7 Chancery Division, 625.]

V.C.M., Feb. 12, 13, 18, 19, 20, 1878.

WATSON V. RODWELL.

[1876 W. 103.]

Solicitor and Client—Settled Account—Costs—Taxation—After Payment—Solicitors Act (6 & 7 Vict. c. 73), s. 41—Special Circumstances—Overcharges.

An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the ground, 1, of undue influence, 2, that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done.

THIS was an action by a widow aged seventy-seven against her solicitor, seeking to open a settled account dated the 22d of May, 1874, and to tax bills of costs which had been paid more than a year before the institution of the suit under the following circumstances:—

William Watson, the plaintiff's husband, by his will, dated in 1861, appointed the plaintiff and J. Wilson executrix and executor, and devised and bequeathed his property, which consisted only of leaseholds and shares in the London Joint Stock Bank, to his wife, the plaintiff ; but on

the construction of the will it was not clear what interest she 626] took, whether absolute or for life only. Her *sister, Mrs. Woodman, took an annuity under the will, and Mrs. Woodman's children took a contingent remainder in the leaseholds if the construction that the widow took only a life interest was correct.

William Watson died in 1872, and an administration suit of *Watson v. Wilson* was instituted by the plaintiff on the 7th of June, 1872, for the purpose of deciding the questions of construction arising upon the will, Messrs. Kimber & Ellis being the solicitors.

On the 28th of November, 1872, a suit was instituted by Walter Woodman, one of Mrs. Woodman's children, for administration of the same estate, and seeking to restrain the plaintiff from dealing with the property of the testator as if it belonged to her absolutely. It appeared by the evidence that Mr. Rodwell, the solicitor of Walter Woodman, agreed with him that he should only pay costs out of pocket.

The plaintiff eventually took a decree in *Watson v. Wilson* as a short cause, notwithstanding Mr. Rodwell's resistance, and no decree was ever taken in the second suit.

Negotiations for a compromise between the plaintiff and the Woodman family were set on foot, in which Mr. Rodwell acted for the Woodmans, but in the month of July, 1873, the plaintiff went to Mr. Rodwell's office, apparently at the suggestion of Mr. Rodwell, and became his client. The negotiations proceeded, and resulted in the arranging of a compromise between the plaintiff, her sister, and the nephews, by which the plaintiff was to forgive the latter certain debts, to allow her sister a certain annuity, and to take the residue for herself. All the parties were *sui juris*, except that two of Mrs. Woodman's children were bankrupt, and a deed of arrangement was prepared embodying the following terms: 1. The plaintiff released her nephews, Mrs. Woodman's sons, from certain debts. 2. Mrs. Woodman and her sons assigned to the plaintiff their contingent interests in the leaseholds. 3. J. Wilson (the co-executor) was indemnified from all liability under the will. 4. plaintiff allowed Mrs. Woodman a present annuity of £100 in place of the deferred annuity of £500. 5. The plaintiff undertook to pay all costs of *Watson v. Wilson* and *Woodman v. Watson* and of the first compromise. Two of the sons of Mrs. Woodman being bankrupt the deed was expressed to be provisional only as regarded them.

627] *A petition was prepared by the defendant Mr. Rodwell, acting as solicitor for all parties (to which, how-

ever, the assignee of the bankrupts' estates were not made parties), to obtain the consent of the court to this release, and to wind up the administration suits. An order was made in accordance with the prayer of the petition, and the deed of compromise was executed, together with other deeds, including a deed of indemnity, to Mr. Wilson, the plaintiff's co-executor.

It was proved to the satisfaction of the Vice-Chancellor that the costs of the deeds of compromise and the petition, which in his opinion was unnecessary, amounted to nearly £1,000.

The defendant produced evidence that the deed and the petition were explained to the plaintiff, and that at the hearing of the petition the Vice-Chancellor asked the plaintiff if she understood that she was to pay the costs of the suits, and that she said she did.

At the hearing of the petition it was ordered that £1,000 should be deposited to answer the costs of Messrs. Kimber & Ellis, and certain of the bank shares were converted for this purpose.

On the 25th of March, 1874, the defendant delivered to the plaintiff his bill of costs and cash account, which, after providing for his own and Messrs. Kimber & Ellis' bill of costs, showed a balance due to the defendant of nearly £350.

On the 22d of May, 1874, the balance due to the defendant was agreed at £230, and a memorandum to that effect was placed at the foot of the cash account, and signed by the plaintiff and defendant. The defendant relied on this as a settled account, and declined to reopen it or to have any bills prior to that date taxed.

The defendant was in the habit of making advances to the plaintiff, who was now in great poverty, and held securities upon her interest in the leasehold houses to secure the amount owing from her to him, which included further costs.

This action was instituted on the 21st of March, 1876, and is reported on an application with reference to the pleadings (').

Certain correspondence took place after the institution of the action between the plaintiff and defendant personally, in which *the defendant found fault with the plain- [628
tiff's present solicitors, and tried to persuade her to leave them, and on being ordered to pay certain costs of an application made in the action, he paid them to the plaintiff personally and not to her solicitors.

(') 3 Ch. D., 380.

Higgins, Q.C., and *Fooks*, for the plaintiff: The plaintiff has acted under pressure and undue influence, and was never made to understand what costs she was paying: *Smith v. Kay* ('); *Rhodes v. Bate* ('); *Barrett v. Harlley* ('); *Talbot v. Marshfield* ('); *Langstaffe v. Fenwick* ('). The amount of costs has been altogether excessive, and the circumstances are sufficient to induce the court to open the account, and order the bills to be taxed.

Excessive overcharges are "special circumstances" within the 41st section of the Solicitors Act: *Morgan v. Higgins* ('); *Gardener v. Ennor* ('); *In re Robinson* ('); *Coleman v. Mellersh* ('); *Tomson v. Judge* ('); *Cooke v. Setree* (').

Glasse, Q.C., and *Renshaw*, for the defendant: Twelve months, in the absence of fraud, is an absolute bar to the taxation of a bill which has been paid twelve months: *Balgrave v. Routh* ('); *Waters v. Taylor* ('); *Horlock v. Smith* ('); *Davis v. Parry* (').

Mere overcharge is not a special circumstance within the act. *Re Barnard* ('); *Re Harle* ('). *In re Robinson* (') is contrary to all the cases in chancery.

MALINS, V.C., after stating the institution of the administration suits of *Watson v. Wilson* and *Woodman v. Watson*, continued:

It is said by the defendants that counsel advised the institution of the second suit, but there was, in my opinion, no justification for the institution of it, for there was one already in existence for the administration of the same estate, and the Woodman family might have attended the proceedings in that suit. The suit of *Watson v. Wilson* was heard as a short cause, notwithstanding Mr. Rodwell's opposition, and no decree was ever taken in the second suit, and its institution has been a mere waste of expenditure. Then a most material circumstance for the decree which I am about to make is that the defendant Mr. Rodwell agreed with Walter Woodman, the plaintiff in that second suit, that Walter Woodman should only pay Mr. Rodwell costs out of pocket, so that it was his interest to get his remaining costs out of Mrs. Watson, when she afterwards became

(') 7 H. L. C., 750.

(') Law Rep., 1 Ch., 252.

(') Law Rep., 2 Eq., 789.

(') Law Rep., 4 Eq., 661; Law Rep., 3 Ch., 622.

(') 10 Ves., 405.

(') 1 Giff., 270.

(') 35 Beav., 549.

(') Law Rep., 3 Ex., 4.

(') 2 Mac. & G., 309.

(') 3 Drew., 306.

(') 1 V. & B., 126.

(') 2 K. & J., 509; 8 D. M. & G., 620.

(') 2 My. & Cr., 526.

(') 2 My. & Cr., 495.

(') 1 Giff., 174.

(') 2 D. M. & G., 359.

(') 17 W. R., 21.

his client. She became his client, according to the evidence, on his invitation or suggestion, in the month of July, 1873, when he was already acting for her nephews, who took an opposite view from her of the construction of the will, and when it was his interest, as mentioned above, to get all the costs of the second suit, instituted by him, out of her estate. Then in the eight succeeding months a more extraordinary amount of costs than I could have conceived possible was made up against the plaintiff, amounting to sixteen bills of costs, more than 472 folio pages in the whole, and these costs were merely for managing a few leasehold houses producing £300 a year, and some shares in the London Joint Stock Bank; and the only business done was the carrying out of the compromise. All parties to that compromise were *sui juris*, and a short deed, which an experienced conveyancer could have settled in a few hours, would have concluded the matter. But I find in the defendant's bills continual charges for attendances, consultations, and other business in reference to this matter, multiplying the costs to hundreds of pounds in a manner almost incredible. £1,100 was charged by Mr. Rodwell alone in eight months for doing that which ought to have been done for £50 or £100 at the utmost. Not only this, but a petition for confirmation of the compromise was advised and presented, all parties, as I said before, being *sui juris*, except that two of the nephews were bankrupts, and actually their assignees were not brought before the court; so it was a purely mistaken proceeding; but this also led to costs amount- [630 ing to over £400. It appears from the evidence that I put some questions to the plaintiff on the hearing of the petition, but I had not the information I now have, especially as to the agreement between the defendant and Mr. Woodman as to the costs of the second suit, or my questions would have been very different. It now turns out that Mr. Rodwell, as part of the arrangement, made the plaintiff pay the costs of an adverse litigation, amounting to £291, without telling her of that agreement that the plaintiff in that second suit should only pay costs out of pocket. On the 27th of March, 1874, Mr. Rodwell sent accounts to the plaintiff, who must be taken upon the evidence to have been acting without proper independent advice, and a deed of release, which cost over £100, for her to sign. There was no occasion for a release. Mr. Wilson, the co-executor of the plaintiff, had done nothing but prove the will, and had incurred no responsibility, there having been an administration decree made in the first suit. By those accounts Mr. Rodwell and other solicitors

who had been employed in these transactions were allowed to take more than £1,000 in costs. It is said that this deed was fully explained to the plaintiff, but she could not have been made fully to understand the position in which she was placed. The deed was executed. After this, on 22d of May, 1874, a complicated account was settled between the plaintiff and Mr. Rodwell which, under the above circumstances, the plaintiff, being aged and inexperienced, could not have understood; he there charged her with the costs of the adverse suit against her, which was an improper charge, especially after the agreement with the nephew to take from him only costs out of pocket. Now, then, I have to decide first whether these accounts and bills of costs are liable to be opened and taxed, notwithstanding the settlement of account. It is shown that the plaintiff was not in a position to resist the demands made by the defendant, for she was always under pressure for money, which he sent her from time to time, and she is proved to have asked him on that very day for an advance of £50, and he only allowed her £20. Therefore, as there has been an excessive amount of charges coupled with pressure on the client, I shall allow the accounts to be opened unless the law prevents me from doing so.

[631] *As regards the cases, I concur in the decision in *In re Robinson* (¹), and hold that exorbitance of charge has always been held a special circumstance, inducing the courts to open bills of costs after a year, and here I find the bills of such an inordinate amount that I consider them within the principle. The court will also look to the position of the parties and the relation of solicitor and client. No doubt, where the client is a business man able to defend himself, the court is slow to undo such a transaction; but in the case of an aged woman, ignorant and uninformed, it cannot hesitate to do so. In the case of *Morgan v. Higgins* (²), the client being in ill-health and unable to manage his own affairs, a settled account between him and his solicitor was set aside, the court being of opinion, as I am in this case, that the client was not of sufficient capacity and knowledge to defend his own interests properly; certainly no one can say that in this case the plaintiff could estimate the propriety of the bills. The case of *Gardener v. Ennor* (³) shows how jealously the court regards the position of solicitor and client in transactions like the present. *Davies v. Parry* (⁴) was also decided by Sir J. Stuart, and illustrates the same

(¹) Law Rep., 3 Ex., 4.

(²) 1 Giff., 270.

(³) 35 Beav., 549.

(⁴) 1 Giff., 174.

principle. The rule laid down in *Lawless v. Mansfield* (*) by Lord St. Leonards has, no doubt, been questioned in *Blagrove v. Routh* (*), but not so as to throw any doubt on the principle that the court will open such an account under special circumstances. The cases of *Waters v. Taylor* (*), *Blagrove v. Routh*, and *Horlock v. Smith* (*), have been principally relied upon by Mr. Glasse. But in *Waters v. Taylor* an account was attempted to be opened which had been acquiesced in for eighteen years, and Lord Cottenham declined to do so. In *Horlock v. Smith* the Lord Chancellor gives the reasons for not opening the account; he says (*): "The relation of solicitor and client has ceased; another solicitor has been employed by the client, and there is no evidence of pressure." So again, *Blagrove v. Routh*, where no relief was given, was a case where long litigation had been carried on, and five years and a half before the bill *was filed the relation of solicitor and client had been [632 determined, and the court, not being satisfied that there was anything unfair or unreasonable in the account, declined to interfere. In these cases then the clients had had other advice.

But here the relation of solicitor and client continued, and there was evidently very great astuteness, energy, and pressure on the one side, and ignorance, incapacity, and want of business habits on the other. I consider that it is a case where relief ought to be given. The case of *Coleman v. Mellersh* (*) is very applicable, and I decide that, as in that case, the account must be dealt with as an open account. No doubt if this plaintiff had gone on for an unreasonable time without making any claim against the defendant, the court must have refused to interfere, for it would be impossible to say that after any lapse of time a settled account must be opened. But a year's delay is not necessarily fatal to the claim, for the court is left by the act of Parliament to decide what "special circumstances" are sufficient to enable it to refer a bill of costs for taxation after payment. Indeed, I can see no honest reason why these complicated accounts should have been settled when they were, why these exorbitant bills of costs should have been sanctioned while the relation of solicitor and client still went on. The defendant must have considered that he would thus be able to defy all attempts at taxation. The result is that between the year 1872, when the plaintiff's husband died, leaving her in com-

(*) 1 D. & War., 557.

(*) 8 D. M. & G., 620.

(*) 2 My. & Cr., 526.

(*) 2 My. & Cr., 495.

(*) 2 My. & Cr., 520.

(*) 2 Mac. & G., 309.

fortable circumstances, and 1874 she has been brought into a state of abject poverty, having had to pay or become liable for, so far as I can calculate, between £2,000 and £2,500 in costs.

The defendant has since the institution of this suit written to the plaintiff herself, telling her that her present solicitors are not conducting her business and defending her interests properly, and seeking to get her as a client of his own again. He has also paid certain costs, which I ordered him to pay, of an application in the suit, to the plaintiff personally instead of to her solicitors, adopting, as he said, under irritation, a course for which he could give no justification.

The accounts alleged to be settled must be opened, and all costs of *Woodman v. Watson* and of the petition must be [633] disallowed. *There must be a general account of all dealings between the plaintiff and defendant, and the usual accounts of what is due on the securities, and the defendant must pay the costs of the action.

Solicitors: *Stevens & Co.; Joseph Mole.*

[7 Chancery Division, 633.]

V.C.M., Feb. 22, 1878.

TWEEDALE V. TWEEDALE.

Power of Appointment—Power coupled with a Trust—Condition Precedent—Impossibility of Condition—Marriage with Consent.

A testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune on her death to her husband. She married in the testator's lifetime with his consent:

Held, that the provision was equivalent to a gift to the husband of the life interest.

PETITION. James Tweedale, by his will, dated the 16th of November, 1820, declared that in case any of his daughters should marry with the approbation of the trustees under his will, he gave his trustees power to grant to the husband of any daughter so marrying, for the term of his natural life, the interest, dividends, and annual produce of the fortune of such daughter, or such part thereof as the trustees in their discretion should think proper in the event of his surviving his said wife.

The testator died on the 16th of July, 1839, leaving three sons and three daughters surviving, one being Susan Rose Lushington, who was married, with the testator's consent, to Charles Lushington in 1835.

The above suit was instituted for the administration of the trusts of the will, and in such suit a sum of Bank Annuities

was carried over to "the account of the £4,000 bequeathed to Susan Rose Lushington for life."

Two of the daughters became lunatic, and Susan Rose Lushington died on the 5th of September, 1877.

The question was, whether the capital standing to S. R. Lushington's account should go to the estate of the lunatic sisters at *once, or whether Charles Lushington was [634 entitled to the income thereof under the above stated provision in James Tweedale's will.

The trustees of the will had made no appointment.

Prior, for the petitioner: Is it not a condition precedent to the husband's taking an interest, that the trustees should approve the marriage?

Norton, for the respondents: Though the trustees never approved the marriage of Mrs. Lushington, because it took place before the testator's death, yet as the testator did, it comes to the same thing; and the court can do that which the trustees were empowered to do: *Lewin on Trusts* ('); *Gower v. Mainwaring* (').

[MALINS, V.C.: My difficulty is, that it is a power given to the trustees which they did not exercise.]

In *Wheeler v. Warner* (') the consent to a marriage similarly given by a father in his lifetime was held equivalent to a consent by the trustees.

Cecil Russell, for the plaintiff in the cause, offered no opposition.

Pryor, in reply: The marginal note of *Wheeler v. Warner* is not quite correct. The testator did not "authorize," but "directed" his trustees to appoint, and the discretion was as to the amount only.

MALINS, V.C.: I am clearly of opinion that whatever the rights of the trustees to exercise a discretion in this case originally were, in the events which happened that discretion was done away with. As the testator's daughter married in the lifetime of her father, it was just the same as regards the fulfilment of the condition as if she had married after his death with the consent of the trustees. But there is a power which has not been exercised. It does not appear that they refused, but they omitted, to exercise the power; and the question now before me is whether the court can say that *the husband can take a life estate not- [635 withstanding that it has not been duly given to him by appointment under the will. I am relieved from difficulty, I think, by the case of *Wheeler v. Warner* ('), which has been cited; for there a daughter, to whose husband the testator

(') 6th ed., p. 681.

(*) 2 Ves. Sen., 87.

(*) 1 S. & S., 304.

directed his trustees to advance part of her fortune (they having a discretion as to the amount) if she married with their consent, married, as here, in the testator's lifetime, and Sir John Leach decided, first, that the father's consent was equivalent to that of the trustees; and, secondly, that the direction was, under the circumstances, equivalent to a gift to the husband of all that the trustees had power to appoint. I shall adopt the principle of that judgment, and hold that the husband is entitled to a life interest in the fund.

Solicitors: *Norton, Rose, Norton & Brewer.*

[7 Chancery Division, 635.]

V.C.M., Feb. 8, 1878.

In re ANDREWS' TRUSTS.

Bankruptcy Act, 1869, s. 91—Trader's Settlement—Covenant to settle—Interest in Property.

A trader, who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself and the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him and the remainder to other children, and subsequently he became bankrupt:

Held, that the covenant was not void under sect. 91 of the Bankruptcy Act, 1869.

[7 Chancery Division, 637.]

V.C.M., Nov. 17, 24, 1877.

637] **In re* GENERAL SOUTH AMERICAN COMPANY.

Foreign Bill of Exchange—Re-exchange—Liability of Acceptor.

The drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonored and protested, to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonor, including the expenses of re-exchange.

THIS was an adjourned summons in the winding-up of the General South American Company on a claim made by the Bank of Lima to a sum of £2,460 11s. 6d., reduced from the original claim, which was £8,119, for money paid by the bank in respect of re-exchange upon various bills of exchange which had been drawn by the bank upon the company, and were subsequently dishonored by the company.

The General South American Company was established in the year 1868, to carry on the business of general merchants 638] with *America, and this business was pursued successfully for many years. The company had an agent at Lima named Chavez, who entered into an agreement with the

Bank of Lima to grant it a continuing credit of £100,000, upon the terms of a letter of the 11th of April addressed to Mr. Chavez by the managers of the Bank of Lima, which was in the following words:—

“Dear Sir,—We have read the basis you have been pleased to fix in order to open a credit to the Bank of Lima, and we take the liberty to state in continuation a project of arrangement in this respect in order to know if we express them rightly, and if they meet with your approbation.

“1. The total amount of credit will be £100,000, to dispose of all or part as it may suit the bank, drawing bills on London at ninety days on the General South American Company.

“2. As soon as the bank may have drawn the first draft they will pay to the General South American Company $\frac{1}{4}$ per cent. on full amount of credit, £100,000 as opening commission, that is to say, the sum of £500 sterling, which payment of commission will be for once only.

“3. They will also pay to said South American Company a commission of 3-4th per cent. for acceptance and payments of bills on the amount of drafts the Bank of Lima may draw on them.

“4. The Bank of Lima will allow the South American Company interest at 5 per cent. per annum, or 1 per cent. above bank rate, when it exceeds 5 per cent. per annum.

“5. The Bank of Lima are under the obligation to cover their drafts within ninety days after the dates of their acceptance in London with other bills at ninety days' sight which may not be drawn on the same General South American Company.

“6. The credit of £100,000 will always be in force for the Bank of Lima according as they place the General South American Company in funds for the amounts as they may have drawn against them.

“7. The bills which the Bank of Lima may draw on the General South American Company must be signed by one of the two undersigned managers as follows: For the Bank of Lima, the managing directory.

“We wish that the business may be the beginning of larger *transactions that the Bank of Lima may be able to [639 do with the South American Company for our benefit; and we beg to subscribe ourselves

“Your obedient servants,

“Julian Laracondegm, } Managing,
“T. F. Lembeke, } Directors.”

To this letter M. Chavez replied, on the 13th of April, to the managers of the bank in these terms:—

“Dear Sirs,—In answer to your favor of yesterday I have the pleasure to inform you that you have expressed rightly the basis of the credit I took the liberty to submit to you in favor of the Bank of Lima, and for my part the business remains accepted under the conditions contained in your letter; in virtue of this you can begin drawing when it may suit you, and to this effect I write by the steamer of tomorrow to the General South American Company, informing them of this arrangement, which I am sure will be received with satisfaction. Entertaining the same desire as yourselves, that this business will be the beginning of others which will be undertaken later on between both companies to their mutual benefit, I subscribe myself

“Your obedient servant,

“Manuel C. Chavez.”

These terms were confirmed by the General South American Company; and by a subsequent communication from the company it was stipulated that the Bank of Lima should cover their drafts upon the company seventy-five days after their respective dates, and this stipulation was acceded to by the bank. The arrangement was afterwards varied by reducing the amount of the credit from £100,000 to £50,000, but in all other respects it was carried out in the following manner: The Bank of Lima used to draw upon the General Company at ninety days' sight and the General Company accepted these bills. The Bank of Lima used to remit cover fifteen days before the due date of the acceptances, and the business was carried on upon this footing until the stoppage of the General Company on the 18th of March, 1875. On the 5th of April, 1875, resolutions were passed by the company to wind up voluntarily, and on the 16th of April [640] the voluntary winding-up *was continued under supervision by an order of the court, and liquidators were appointed.

The position of matters between the Bank of Lima and the General Company at the date of its suspension on the 18th of March, 1875, was as follows: On the whole transaction the bank were creditors of the company, without any allowance for re-exchange, for about £27,905, and they had been admitted as creditors for that sum, and had received their dividends upon it.

In addition to the above sum the Bank of Lima sought to be admitted to prove for a sum of £10 per cent. for re-ex-

change on the amount of bills sent back to Peru, which they had had to pay, and which was alleged to be a fair and proper charge in a case like the present, and the amount which the holder of a bill was entitled to charge according to the laws of Peru upon a bill being dishonored and protested. On the other hand, the liquidators submitted that the bank could only prove for such charges as were properly incurred in respect of protests, notarial charges, and consular fees, or otherwise for the purpose of obtaining substituted credit in respect of acceptances for which cover was held by the company at the date of the stoppage, and these sums had already been offered to the bank, but were refused.

J. Pearson, Q.C., and Kekewich, Q.C., for the Bank of Lima: The contract in this case, which was entered into by the Bank of Lima and the South American Company, upon the terms of the two letters of the 11th and 13th of April, 1875, was an English contract, and was to be performed entirely in England. There was to be a credit of £100,000, subsequently reduced to £50,000. The drawing by the bank was to commence at once, and the moment the bills were drawn the company was bound under the contract to accept those bills. It was an unqualified agreement to accept the bills. We say we have a right to recover £10 per cent. upon the dishonored bills, in consequence of the loss and damage caused to us by such dishonor. There is no evidence to show that we did not perform our part of the contract, and there were sufficient funds in the hands of the company at the time of the stoppage to answer all the bills drawn by us. We have it in evidence that we have been obliged to pay 10 per cent., and that *that is a reasonable amount, and [64] that amount of damage we call re-exchange. Whether we rely on express contract, or on the ordinary contract between drawer and acceptor, we are entitled to these charges.

In *Walker v. Hamilton* (*) it was held that the acceptor in London of a bill of exchange drawn in Louisiana was entitled to prove not only for the amount of the bill, but also for 10 per cent. upon the amount in lieu of re-exchange, which by the law of Louisiana he had been obliged to pay on the bills being dishonored and protested. The same principle was acted upon in *Francis v. Rucker* (*), but the amount in that case was £20 per cent., which the acceptor was liable to under the law in force in Pennsylvania. *Rolin v. Steward* (*) and *Prehn v. Royal Bank of Liverpool* (*) are authorities to the same effect.

(*) 1 D. F. & J., 602.

(*) 1 Amb., 671.

(*) 14 C. B., 595.

(*) Law Rep., 5 Ex., 92.

[They also cited *Mellish v. Simeon* (') and Story on Bills of Exchange (').]

Glasse, Q.C., *Higgins*, Q.C., and *Woolf*, for the official liquidator: Re-exchange is defined in Byles on Bills (') to be the difference in the value of a bill occasioned by its being dishonored in a foreign country in which it was payable. The theory of the transaction is, that the holder of a foreign dishonored bill is entitled to immediate repayment by drawing and negotiating a cross bill, payable at sight on the indorser in London, for as much English money as will purchase in the foreign country the amount of foreign currency at the rate of exchange on the day of dishonor. No cross bills were drawn in this case, and therefore there is no liability for re-exchange, but it is laid down by the same author that the drawer of a bill is liable to re-exchange, though the acceptor is not so liable. In support of this two cases are cited, *Napier v. Schneider* (') and *Woolsey v. Crawford* ('), where it was held that the holder of a dishonored bill has no right to re-exchange from the acceptor. 642] There is evidence here that there has *not been at any time a quotable exchange in respect of drafts drawn here on Peru; there cannot, therefore, be a claim for the re-exchange on drafts drawn on Peru, if no such thing as re-exchange exists in Peru. It is also laid down in Chitty on Bills ('), that though the drawer of a bill is liable for re-exchange, an acceptor is not liable, and his contract cannot be carried further than to pay the sum specified in the bill, together with legal interest where interest is due.

Then, if the claim is not for re-exchange but for damages, the damages are not proved. It is not enough for the bank to say, We have paid to a third party £10 per cent. on our drafts. They might as well have fixed any other much larger amount. Even if, as against the drawer, the holder might be able to claim £10 per cent., it would not prove, that as between the drawer and acceptor, the claim is one that can be admitted according to English law.

We say, therefore, that the company, as acceptors of the drafts, are not liable, either by the law of England or Peru, to re-exchange; that there is no contract by the company to pay re-exchange, and if there is no contract there can be no damages for its breach; that the claim fails, according to Peruvian law, because there was no cross bill drawn by the bank; that in any case the company can only be liable for

(1) 2 H. Bl., 378.

(2) 4th ed., p. 489, sec. 898.

(3) 10th ed., p. 412.

(4) 12 East, 420.

(5) 2 Camp., 445.

(6) 10th ed., p. 442.

the actual protest and notarial charges and consular fees paid upon those acceptances of the company which were dishonored and for which the company held cover at the date of the suspension; and that the £10 per cent. is an arbitrary sum and does not represent the amount of damages actually sustained by the claimants.

[They also cited Chitty on Bills.]

J. Pearson, in reply.

MALINS, V.C.: This is a case raising a question which very seldom occurs in a court of equity. If I thought any advantage would arise from deferring my judgment I would certainly do so, but having well considered the authorities which have been cited, I feel that I shall not derive any benefit from further considering the matter.

*The question arises out of certain mercantile trans- [643 actions which took place between the Bank of Lima and the General South American Company, which is now going through the process of being wound up. This company has been represented to me as one which was formerly of high repute, but troubles having come upon them they were obliged to stop payment. The transactions which now give rise to this question were commenced in 1871, when a contract was entered into between the company and the Bank of Lima, which was founded upon two letters dated the 11th and 13th of April, 1871, and without reading them I may state that they were to this effect—that the company was to give the bank credit to the total amount of £100,000, to dispose of all or any part as it might suit the bank, drawing bills in London at ninety days on the General South American Company, and as soon as the bank should have drawn the first draft they were to pay to the company $\frac{1}{4}$ per cent. on the full amount of credit as opening commission, that is, the sum of £500, which payment of commission would be for once only. The bank was also to pay to the company a commission of $\frac{1}{4}$ per cent. for acceptance and payment of bills on the amount of drafts the bank might draw on them, and the bank were to allow the company interest at 5 per cent. per annum, or 1 per cent. above bank rate when it exceeded 5 per cent. Then the Bank of Lima were to be under obligation to cover their drafts within ninety days after the dates of their acceptances in London, with other bills at ninety days' sight which might not be drawn on the company. The credit of £100,000 to be always in force for the bank, according as they placed the company in funds for the amounts they might have drawn against them. The only doubt which seems to arise upon the letters forming

this contract, is whether the ninety days were to run from the acceptance of the bills or the time when they arrived at maturity. These transactions went on from April, 1871, till March, 1875, when the company suddenly stopped payment, and there was no delay in the appointment of a liquidator. It appears on the evidence and the correspondence between the company and the bank, that though there might have been some kind of complaint occasionally on the part of the company as to the quality of the bills sent over by the bank, [644] those complaints were rectified, *and no serious difficulty arose, so that it may be fairly said that the business was conducted upon the basis of the original contract, with satisfaction to both parties, and there was no substantial failure on the part of either to fulfil their engagements.

It appears that at the time of the failure of the company in March, 1875, the company held as cover to its acceptances £37,000 in bills and cash, which were afterwards returned by the liquidators to the agents of the bank with the sanction of the Chief Clerk, and at that time the bank were creditors of the company for about £27,905, and they have been admitted as creditors for that sum, and have received their dividend upon it. As a consequence of the stoppage of the bank, the acceptances were thrown back dishonored upon the Lima Bank, and what I have now to consider is the effect of that dishonor.

It is admitted that the company are liable for all the bank claims, except those charges which are called re-exchange. That is, the liability is admitted as to all the claims except for the £10 per cent. Now it has been argued that although a drawer is liable for the re-exchange, or what is substituted for re-exchange, an acceptor is not so liable, and this is supported by the authority of the case of *Woolsey v. Crawford* (¹) and *Napier v. Schneider* (²); but it is said that those two cases are overruled by the authority of *Walker v. Hamilton* (³). In that case the Lord Chancellor, in referring to *Napier v. Schneider*, said he thought if a fixed sum of £10 per cent. had been asked for, that would have been granted; but instead of that an uncertain sum, to be fixed by the master, was asked for, and on that account the application was refused. Then his Lordship said, in speaking of the case of *Woolsey v. Crawford*, that it was at most a *nisi prius* decision, and the point there decided only applied to the re-exchange, not to a sum which was liquidated and which could have been easily ascertained. But as to that *nisi prius* case, if it had been expressly in point, he

(¹) 2 Camp., 445.

(²) 12 East, 420.

(³) 1 D. F. & J., 602.

should have said it could not outweigh the solemn decision of *Francis v. Rucker* ⁽¹⁾.

Now I cannot accede to the argument that a drawer is under greater liability than an acceptor. I am of opinion that the *primary liability is in the acceptor. The [645 liability of the drawer is secondary, and if the drawer is liable so must the acceptor be.

The first case in which the acceptor was made liable is that of *Francis v. Rucker* ⁽¹⁾. There it was shown that by the law of Pennsylvania a bill drawn or indorsed there on persons in England and protested was to be paid to the holder with 20 per cent. for damages. Bills on a merchant in England were accepted by him. He then became bankrupt before the bills were due. They were protested for non-payment, and the drawer having paid the money due on the bills, and the 20 per cent. to the holder, was permitted to prove both under the commission. Then the case of *Walker v. Hamilton* ⁽²⁾ shows the liability of an acceptor. A drawer of bills of exchange in Louisiana upon acceptors in London was held to be entitled to prove under a deed of arrangement executed by the acceptors upon their becoming insolvent not only for the amount of the bills, but also for £10 per cent. upon the amount in lieu of re-exchange, which by the law of Louisiana he had been obliged to pay to the holder of the bills on their return, dishonored and protested for non-payment in Louisiana. But I think the case which governs this in all respects is *Prehn v. Royal Bank of Liverpool* ⁽³⁾. There the defendants, who were bankers at Liverpool, undertook to accept the drafts of the plaintiffs, who were merchants at Alexandria and Liverpool, the plaintiffs undertaking to put the defendants in funds to meet the bills at maturity, and the defendants receiving $\frac{1}{4}$ per cent. for the accommodation. Bills were accordingly accepted by the defendants, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due the defendants' bank stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying $2\frac{1}{2}$ per cent. commission, and they were also obliged to pay to the bankers the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expenses in telegraphic communications between Liverpool and Alexandria. The decision was that the acceptors of the bills were liable for the *commission and the notarial and telegraphic ex- [646

⁽¹⁾ Amb., 671.

⁽²⁾ 1 D. F. & J., 602.

⁽³⁾ Law Rep., 5 Ex., 92.

penses which the drawers had incurred. Lord Chief Baron Kelly said, in giving judgment, that, according to general principles, where parties entered into a special contract they were entitled in case of breach to recover in respect of any damage reasonably flowing from the breach; he was of opinion that the expenses incurred were reasonable, and the plaintiffs were entitled to recover the money as general damage. Baron Pigott in his observations said he regarded the amount claimed as special damages, which were to be measured by the $2\frac{1}{2}$ per cent. which the plaintiffs paid, and the other actual expenses they incurred.

The principle there decided is that those necessary expenses incurred by the drawer of a bill in consequence of its having been dishonored and protested by the acceptor, the drawer is entitled to recover from the acceptor. Therefore I think, on the authority of that case and the other cases I have referred to, the principle is established, that where a bill is dishonored the drawer is entitled to recover from the acceptor, not only the amount of the bill and interest, but also all such reasonable amount of expenses as may have been caused by the dishonor, including the expenses of re-exchange, and that in this case the South American Company is liable for what has been reasonably expended by the Bank of Lima.

The only remaining question therefore is, what is a reasonable amount. If this were an action tried at law, the question of amount would necessarily be submitted to a jury, but it appears that the Bank of Lima has paid £10 per cent. for the re-exchange, and there is no evidence to show that that sum is in any manner unreasonable; therefore, in my opinion, the bank is entitled to have the amount of their claim admitted against the company.

Solicitors: *Freshfields & Williams; Michael Abrahams & Roffey.*

[7 Chancery Division, 650.]

V.C.H., Dec. 14, 1877.

650]

**In re LENZBERG'S POLICY.*

*Composition with Creditors—Single Creditor, Agreement for subsequent Payments to—
Payments thereunder, Recovery back of—Fraud on Creditors.*

Where a creditor at the time of signing a composition deed under the 192d section of the Bankruptcy Act, 1861, took from the debtor a private agreement that the debtor should make future payments on his account:

Held, that the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder.

SOME time before September, 1869, Louis Lenzberg, being indebted to William Mosson Kearns (who had previously acted as his solicitor) in respect of various sums of money advanced from time to time by Kearns, deposited with Kearns, as a security for such advances, a policy of assurance upon the joint lives of himself and his wife for the sum of £1,000. Lenzberg had also before this time been in the habit of making certain weekly and monthly payments to certain persons in respect of allowances made to them by Kearns.

In September, 1869, Lenzberg being in difficulties, obtained the assent of several of his creditors to a composition deed, and on the 4th of the same month he went down into Wales, where Kearns was on a visit, to procure the execution by Kearns of the deed. After some discussion Kearns executed the composition deed as a creditor for £373 18s. 7d. The evidence as to the circumstances under which the deed was executed by Kearns was conflicting, and is stated below.

*After Kearns had executed the composition deed, [651 Lenzberg, at his request, signed the following memorandum :

“4th Sept., 1869.

“To William M. Kearns,

“I acknowledge that the weekly advances to Frederick Hart, and the monthly advances to Mrs. Emarton, and the weekly advances to Mrs. M. K. were agreed to be credited against the debts generally due from me to you, and the first and third of such payments, &c., will continue to be made by me and credited by you on account of such debts of 1863, 1864, 1865, 1866, 1868, and 1869.

(Signed) “Louis Lenzberg.”

Lenzberg then returned to London, and the deed having been executed by the statutory majority of his creditors, was duly registered under the Bankruptcy Act, 1861. Lenzberg subsequently made numerous payments in respect of the allowances to the persons mentioned in the memorandum, and other pecuniary transactions took place between him and Kearns.

In 1875 Lenzberg's wife died, and conflicting claims were made by Kearns and Lenzberg to the moneys which then became payable under the policy of assurance, Kearns claiming to be a creditor of Lenzberg for an amount exceeding the sum assured in respect of debts incurred both before and after the composition deed, and Lenzberg maintaining that all debts prior to the composition deed had been released

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In re Lenzberg's Policy.

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thereby; and that by means of the payments made by him in respect of the allowances he had paid the whole of the composition due to Kearns under the deed, and was only justly indebted to Kearns in a sum of £170 or thereabouts. Under these circumstances, the assurance company paid the policy moneys into court, and upon a petition presented by Lenzberg, the Vice-Chancellor, on the 9th of February, 1877, directed an account to be taken of the moneys owing by Lenzberg to Kearns on the security of the policy, and adjourned the further hearing of the petition.

The Chief Clerk made his certificate on the 20th of November, 1877, and thereby, after disallowing all claims made by Kearns prior in date to the composition deed, he credited Lenzberg in the account with the payments made by him in respect of the allowances above mentioned, as being payments made for or on account of *Kearns. Kearns then took out a summons to vary the certificate (*inter alia*) by disallowing this credit, and that summons now came for hearing with the adjourned petition. In support of his summons Kearns produced evidence to show that on the 4th of September, 1869, the sum of £373 18s. 7d., the debt in respect of which he executed the composition deed, was only fixed upon as a nominal amount, and to give Lenzberg the requisite statutory majority of creditors; that the real amount of the debt at the time due from Lenzberg to him was very much larger; that the understanding was that no more than £373 18s. 7d. was to be released; and that Lenzberg promised, as a condition of his executing the deed, that he would repay him the whole of his debt in full; and further, that the execution of the composition deed and the giving of the memorandum were two different transactions.

In one of his affidavits, however, he referred to the payments for allowances as having been made on his behalf. Lenzberg gave a different account of the transaction, and the Vice-Chancellor considered that in the result of the evidence the execution of the composition deed and the signing of the memorandum formed part of the same transaction.

Robinson, Q.C., and *F. G. Bagshawe*, for Kearns: Kearns could not have compelled Lenzberg to make the payments in respect of the allowances which are now in question, and such payments were purely voluntary. Being therefore made without any legal obligation, and under the memorandum, they were not on account or on behalf of Kearns so as to entitle Lenzberg to recover them back from him. Lenzberg was never authorized by Kearns to make these payments for him except under the memorandum.

Lenzberg accordingly has no right to be credited with these payments as constituting a debt due to him from Kearns: *Brisbane v. Dacres* ('); *Wilson v. Ray* (').

Methold (*Dickinson*, Q.C., with him), for Lenzberg: Kearns admits in one of his own affidavits the authority to make the payments, but the agreement which he sets up was bad both at law and in equity, and Lenzberg might have obtained an *order that it should be delivered up to be [653 cancelled: *Jackman v. Mitchell* ('); *Mare v. Warner* ('). An agreement of this character is fraudulent and against public policy, and money paid under it can be recovered back: *Bize v. Dickason* ('); *Smith v. Bromley* (').

HALL, V.C.: There is an observation in favor of your contention in *Clay v. Ray* ('), where Willes, J., says ('), in reference to *Smith v. Cuff* ('), "The cases have gone so far as to hold that where the money has been paid it may be recovered back."

Robinson, in reply: The execution of the composition deed, and the giving of the memorandum, were separate transactions, and these subsequent voluntary payments did not decrease the fund applicable to pay the composition, and therefore were not made in fraud of the general body of creditors. In *Atkinson v. Denby* (') the payment recovered back was made by the debtor to the creditor before the execution of the composition deed, and in order to purchase the creditor's consent to it. But if the debtor voluntarily pays the money afterwards he cannot recover it back.

HALL, V.C.: The question in this case is whether the sums paid in these weekly and monthly payments should or should not be brought into account, in the account which has been taken between these two parties. The contention is that the payments in question were made under an arrangement carried into effect by the actual payments, and that these, therefore, are not to be treated as made on account, or to be brought into account. The facts are in dispute. On the one side it is alleged that Kearns agreed to come into the composition for a nominal amount only, and not for the whole of his debt; that there was an almost contemporaneous arrangement (and the agreement is dated the 4th of September), under which these further sums were to be paid; and that the *payments were made under [654 that arrangement. In the course of the argument I have been

(') 5 Taunt., 143.

(') 10 A. & E., 82.

(') 13 Ves., 581.

(') 3 Giff., 100.

(') 1 T. R., 285.

(') Cited 2 Doug., 695.

(') 17 C. B. (N.S.), 188.

(') 17 C. B. (N.S.), 190.

(') 6 M. & S., 160.

(') 7 H. & N., 934.

referred to authorities on the point, whether money actually paid, as this was, can be recovered back. The last case referred to of *Atkinson v. Denby* ⁽¹⁾ is an authority that it can. Then it is endeavored to distinguish this case in its circumstances. It is said that the memorandum which Lenzberg signed was a memorandum providing for future payments, which Kearns was not bound to make, and that from the character of the payments there was nothing wrong in the stipulation taken from the debtor. I cannot agree to that. It seems to me that the taking of any such engagement, whether the debtor is bound to pay or not, is equally obnoxious to the rule which prohibits private or independent agreements with creditors at the time when a general arrangement is being made with them. Those agreements are called by law fraudulent, and are so far considered so that money paid thereunder has been recovered back. It is said that this was an independent transaction, distinct from the composition. But it is to be observed that it is part of the same case that this creditor signed the composition for a nominal amount. It is therefore not clear that the giving of the memorandum was a distinct transaction; but it would seem as if the true explanation of what took place is, that Kearns was not content with a verbal promise, but got the stipulation put into writing. It therefore seems to me that the payments so made to the creditor's nominees are to be treated as having been made to himself, as they were on his own account, and one within the rule. But independently of that rule, I think that the obtaining of this letter from the debtor by Kearns, under the circumstances in this case, was a transaction which the court would not allow to stand; and, accordingly, on equitable grounds alone, I cannot allow Kearns the benefit of any contract contained in the document. The conclusion is that the moneys in question were moneys paid by the debtor for the use of the creditor, and ought to be brought into account; and Mr. Robinson's client must pay the costs of the summons.

Solicitors: *Miller, Smith & Bell; Johnson & Master.*

(1) 7 H. & N., 924.

[7 Chancery Division, 655.]

V.C.H., Jan. 15, 1878.

*TRESTRAIL V. MASON.

[655]

[1876 T. 48.]

Locke King's Act (17 & 18 Vict. c. 118)—Mortgage comprising Realty and Personalty—Devise of Realty—Residuary Legatee—Payment of Mortgage Debt.

Where real and personal estate are comprised in the same mortgage, the mortgage debt must, as between the devisees of the realty and the legatees of the personalty, be borne ratably by the real and personal estate subject thereto, and the real estate is not, under Locke King's Act, primarily liable to the payment thereof.

ADMINISTRATION ACTION. The testatrix, whose will was dated and proved after the passing of Locke King's Act, devised her real estate upon trust for one set of beneficiaries, and bequeathed her residuary personal estate upon trust for another set of beneficiaries. Part of the real estate of the testatrix and a policy of assurance forming part of her residuary personal estate were together comprised in a mortgage security which had been effected by the testatrix; and the question was whether the whole of the mortgage debt ought, under Locke King's Act, to be borne by the real estate comprised in the mortgage, or whether it should be borne ratably by such real estate and the policy of assurance.

Bunting, for the plaintiffs, who were persons interested in the real estate: The mortgage debt must be borne ratably by the real and personal estate subject thereto, and the legatees of the personal estate have no right to require the devisees of the realty to discharge the whole debt: *Evans v. Wyatt* (¹); *Lipscomb v. Lipscomb* (²).

B. B. Rogers, for the defendants, who were persons interested in the personal estate: *Evans v. Wyatt* was decided before it was settled that leaseholds *were not [656 within Locke King's Act; moreover, in that case the present point was not argued; neither was it argued in *Lipscomb v. Lipscomb* (²), and when the latter case was referred to with approval by Vice-Chancellor Wickens in *De Rochefort v. Dawes* (³) it was upon another point. There being, then, no decision to govern the question, the words of the act are plain, that land charged with the payment of any sum of money shall, as between the different persons claiming under the deceased, be primarily liable to the payment of all mortgage debts with which the same shall be charged. Accordingly, when two properties, one real estate and the other

(¹) 31 Beav., 217.

(²) Law Rep., 7 Eq., 501.

(³) Law Rep., 12 Eq., 540.

personal estate, are comprised in the same mortgage, the real estate must, as between the devisees and legatees, bear the whole mortgage debt.

HALL, V.C.: I cannot admit the contention that where real estate and personal estate are comprised in the same mortgage the real estate must, under Locke King's Act, bear the whole mortgage debt. *Lipscomb v. Lipscomb* is apparently an authority that under such circumstances the mortgage debt must be borne ratably by the real and personal estate subject thereto, and I shall follow that case.

Solicitors: *R. Mayo; Walker & Battiscombe.*

See 7 Eng. Rep., 736 note; 16 Eng. Rep., 728 note; 20 Eng. Rep., 826 note.

The testator gave to his wife a house during her widowhood and directed that if it should be sold by his executors, with her consent in writing, the proceeds should be invested and the interest paid to her during widowhood; and if testator should dispose of it before his death, she was to have the income of a principal equal to the amount for which it was disposed of. Before his death testator executed a mortgage on the house to secure a debt of his oldest son.

Held, that the wife was bound to keep down the interest on the mortgage during her life, and had no claim against the estate for the amount so paid: *Gelston v. Shields*, 16 Hun, 143.

Where a tenant for life of certain land wilfully neglects to pay the interest accruing upon a mortgage thereon to the end that the same may be foreclosed and the land sold, and such sale is accordingly had, an action lies against the tenant for life by the remainderman to recover the damages he has sustained by reason of such neglect: *Wade v. Malloy*, 16 Hun, 226.

The residue of an estate was given to a widow for life, and after her death to her children. No provision was made

for their support meanwhile, except that advances might be made to them by the widow. She was sole executrix, and pledged certain stocks of the estate as collateral security for her own debts. Some of the children filed a bill against her creditors to obtain the stock. The stock produced no income, and had depreciated very much in market value. The widow had greatly wasted the estate. Held, that the court would not order a sale for the purpose of investing the proceeds and appropriating the income for the benefit of the creditors during the widow's lifetime; and that, under the circumstances, in view of the great waste of the estate that she had committed, she had no interest for the creditors to take: *Prall v. Hamill*, 30 N. J. Eq., 557.

Where an owner of part of the premises, covered by a mortgage, receives the rents therefrom and refuses to apply them on account of the interest due on such mortgage, the taxes thereon being also unpaid, there being no personal security and the premises being insufficient, justifies the appointment of a receiver pending foreclosure, though the unpaid taxes may be a lien subsequent to the mortgage: *Stockman v. Wallis*, 30 N. J. Eq., 449; *Chetwood v. Coffin*, 30 N. J. Eq., 450.

[7 Chancery Division, 657.]

V.C.H., Jan. 15, 1878.

*BERRY V. BERRY.

[657]

[1877 B. 254.]

*Will—Devise—Estate of Trustees—Legal or Equitable—Contingent Remainder—
Provision for Maintenance.*

A testator devised lands to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one, as tenants in common in fee, with remainders over; and empowered the trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority.

A. died leaving four children, three adult and one an infant:

Held, that the contingent remainder of the infant child of A. was equitable, and did not fail by reason of the death of A. before the remainder vested.

EDWARD BERRY, by his will, dated the 13th of February, 1848, devised to trustees, their heirs and assigns, all his real estate, To hold to the trustees, "their heirs and assigns forever, to the use of his nephew Thomas Berry and his assigns during his life," and after the determination of that estate "to the use of such child or children of the said Thomas Berry then born or thereafter to be born as should attain the age of twenty-one years" in equal shares as tenants in common in fee, and in case there should be no such child, then to the use of other persons as tenants in common in fee. The said testator thereby also directed that Thomas Berry, the tenant for life of the hereditaments devised by his will, should keep the buildings thereon in good repair and insured, and in case of his refusal or neglect so to do the testator authorized and empowered the trustees or trustee for the time being of his will to receive the rents and profits of the hereditaments thereby devised, and thereout to pay the costs of repairs, and to effect, and pay the premiums on, the requisite insurances, and to pay the residue of the rents and profits to Thomas Berry. The testator then bequeathed his personal estate upon trust for sale and conversion, and upon trust to lay out the net proceeds, after payment of his debts and legacies, in the purchase of other hereditaments held for an estate in fee simple, which he directed should be conveyed "to the trustees for the time being of his will [658 upon the trusts and for the intents and purposes in his will expressed concerning the real estates thereby devised," or such of the same as should be subsisting and capable of taking effect. And after further provisions not material to be stated, the testator "thereby empowered his said trus-

tees or trustee to apply all or any part of the yearly income to which, under any of the devises, bequests, or dispositions thereinbefore contained, any infant devisee or legatee should be presumptively or otherwise entitled, towards the maintenance and education or otherwise for the benefit of such devisee or legatee during his or her minority," or at the option of the trustees to pay the same to the parent or guardian of such infant without being responsible for its application, and to invest the unapplied surplus (if any), with power to apply the income, or if necessary the capital of the fund, for the maintenance or advancement of the infant, and in the event of his or her attaining twenty-one the fund was to be his or her absolute property. The testator also appointed the same trustees executors of his will.

By a codicil to his will, dated the same day, the testator devised a piece of land which he had contracted to sell to a railway company, "unto and to the use of" the same trustees, their heirs and assigns, upon trust to complete the sale thereof, and to stand possessed of the sale moneys upon the trusts by his will declared concerning his personal estate.

The testator died in March, 1848; and Thomas Berry died in June 1876, having had issue four children, of whom three had attained the age of twenty-one, and the fourth was an infant. The three adult children of Thomas Berry contended that the infant child, not having attained the age of twenty-one years in the lifetime of Thomas Berry, was not entitled to any share in the testator's real estate, and this action was brought by the infant child against the surviving trustee and the adult children for the purpose of having one-fourth of such real estate set apart and appropriated as his share under the said will, with proper provision for his maintenance thereout, and if necessary, of having the real and personal estate of the testator administered under the direction of the court.

659] * *W. Pearson, Q.C., and Jason Smith*, for the plaintiff: The trustees of the will have active duties to perform, and the purposes of the trust continue beyond the life of the tenant for life. The trustees therefore take the legal estate in fee simple under sects. 30 and 31 of the Wills Act (1 Vict. c. 26); and the nature of the duties which they have to perform shows that they must do so. In a certain event they are to receive the rents and profits of the hereditaments devised by the will, and thereout to pay the costs of repairs and insurance. Moreover, they are to apply the income to which any infant devisee may be presumptively entitled towards his maintenance. To have this command

over the possession, rents, and income, they must necessarily take the legal estate: *Jarman on Wills* (¹); *Lewin on Trusts* (²); *Shapland v. Smith* (³); *Silvester v. Wilson* (⁴). In such a case it is immaterial that there is no direct devise to the trustees if the intention that they shall take the estate can be collected from the will: *Doe v. Homfray* (⁵); *Doe v. Cafe* (⁶). If then the trustees take the legal estate the plaintiff's contingent remainder is equitable, and does not fail by reason of the determination of the particular estate by the death of Thomas Berry before the vesting of such contingent remainder, and the plaintiff is entitled to the relief he seeks by this action.

C. T. Simpson, for the defendants: The devise in the will is to the trustees and their heirs to the use of other persons; and all the beneficial limitations are legal limitations. The provisos with regard to the repairs, insurance, and maintenance are mere powers. Moreover, when the testator wished to give the trustees the legal estate he knew how to do so, for by his codicil he devised the land he had contracted to sell to the railway company "unto and to the use of" the trustees, their heirs and assigns, upon trust to carry out the contract. Where a testator, as here, clearly expresses his intention that trustees are to be mere conduit pipes to feed the uses, the court cannot, to preserve a contingent remainder from destruction, hold that the *trustees take a [660 legal estate in fee: *Cunliffe v. Brancker* (⁷); *Houston v. Hughes* (⁸). This gift being a contingent remainder cannot be treated as an executory devise: *Brackenbury v. Gibbons* (⁹).

W. Pearson, in reply: It must be assumed that trustees are to discharge their duties by virtue of an estate and not of a mere power, and the devise to them in the will must be construed accordingly: *Watson v. Pearson* (¹⁰).

HALL, V.C.: I am of opinion that, on the proper construction of this will, the legal estate is vested in the trustees, and that the infant plaintiff is entitled as a *cestui que trust* under the limitation contained in the will of the testator in favor of the children of his nephew Thomas Berry. I found my judgment on the provision for maintenance. It is unnecessary for me to decide whether or not the prior life estate given to Thomas Berry was legal or equitable. From

(¹) 3d ed., vol. ii, pp. 269-272, 295.

(²) 6th ed., p. 187.

(³) 1 Bro. C. C., 74.

(⁴) 2 T. R., 444.

(⁵) 6 A. & E., 206.

(⁶) 7 Ex., 675.

(⁷) 3 Ch. D., 393; 18 Eng. Rep., 568.

(⁸) 6 B. & C., 403, 419.

(⁹) 2 Ch. D., 417; 16 Eng. Rep., 825.

(¹⁰) 2 Ex., 581.

the provision for maintenance I collect an intention that the trustees should, under the disposition to them, their heirs and assigns, take an estate by virtue and force of which they would without express direction receive and take the rents and profits of the property; and that this provision for maintenance constituted a trust of the rents and profits so taken by them, not merely by force and means of a power of entry and of taking the rents and profits, for such is not the clause, but by force and means of an estate vested in them under the devise, this provision being read as a mere direction for the application of the rents and profits which they take by virtue of their estate and interest. The estate which they so take is an estate in fee, and it is equally so whether considered with regard to the law as it existed before the Wills Act, or to the law as altered by sect. 31 of that act.

With reference to the argument founded upon the codicil, if it be the true construction that under the will the tenant for life would take the legal estate, that would be enough to 661] account for *the devise in the codicil to the use of the trustees, their heirs and assigns, upon trust to complete the contract for sale therein mentioned. But if, on the other hand, that be not the true construction, it is not, to my mind, enough to show that all the limitations contained in the will were to be legal limitations. For, even supposing the whole legal fee to have been vested in the trustees under the will, still it would not be an unnatural or unreasonable mode of making provision for carrying into effect a contract, for the testator, instead of merely directing the trustees to carry the contract into effect, and leaving them to do so by virtue of the devise to them in the will, to introduce into the codicil an express devise to the trustees for that purpose. There must, accordingly, be a declaration that, under and according to the true construction of the will of the testator, the children of Thomas Berry take equitable estates in the hereditaments thereby devised, and that the plaintiff, as one of such children, is, contingently on his attaining twenty-one, entitled to one-fourth part of such hereditaments, with the benefit of the provisions in the will contained for the advancement and maintenance of such children, and the accumulation of the surplus income.

Solicitors: *Roscoe, Hincks & Sheppard*, agents for Deacon & Wilkins, Peterborough; *Cowdell, Grundy & Browne*, agents for Wartnaby & Gilbert, Market Harborough.

[7 Chancery Division, 661.]

V.C.H., Jan. 19, 1878.

In re NORTH YORKSHIRE IRON COMPANY.

Winding up—Leasehold Premises, Retention of, by Company—Convenience of the Winding-up—Rent accrued before Commencement of the Winding-up—Rent accrued after—Leave to distrain.

A company in course of liquidation retained for the convenience of the winding-up the possession of leasehold premises of which they were in occupation as assignees of a lease containing the usual proviso for re-entry by the lessors:

Held, that leave should be given to the lessors to distrain for rent accrued due after the commencement of the winding-up, but not for rent accrued due before that time, as to which they must prove as creditors in the winding-up.

[7 Chancery Division, 665.]

V.C.H., Feb. 8, 1878.

**In re* SMITH'S TRUSTS.

[665]

Will—Construction—Original Gift—Issue of Child who might be dead “leaving Issue.”

Where there is a testamentary gift to such of a class as might be living at the death of a tenant for life, and the issue of such of them as might be then dead “leaving issue,” the issue of such members of the class as die leaving any issue will take whether they survive their parent or not.

The dictum of Kindersley, V.C., in *Lanphier v. Buck* (1) on this point disapproved.

PETITION. The testator, Haskett Smith, who died on the 25th of February, 1840, by his will, dated the 25th of July, 1834, devised all his hereditaments at or near Sydenham to trustees to the use of his son William Smith for life, with remainder to his first and other *sons in tail male, [666 and in default of such issue to the use of the trustees and their heirs, upon trust upon the death of his said son and such failure of his issue as aforesaid to sell the said hereditaments, and he declared that the trustees should stand possessed of the sale moneys in trust to pay and divide the same “unto and between or amongst such one or more of his children as might be living at the decease of his said son William without male issue as aforesaid, and the issue of such of his said children as might be then dead leaving issue,” equally to be divided between such child, children, and issue, share and share alike, such issue nevertheless to stand in the place of their parent, and to take equally between them, if more than one, the share which their parent would otherwise be entitled to.

(1) 2 Dr. & Sm., 499.

The testator left his son William and two other children, one of whom was Mary Ann Malin, him surviving. William died without issue in August, 1876. Mary Ann Malin died on the 16th of July, 1872, having had two children, who survived the testator, viz., Mrs. Chilton, who died on the 3d of May, 1861; and Mrs. Farquhar, who was still living.

The question having been raised whether Mrs. Chilton, who predeceased her mother, could take under the testator's gift to the issue of such of his children as might at the death of his son William be dead "leaving issue," the trustees of the will paid the part of the purchase-money of the hereditaments sold which represented the share of Mrs. Chilton into court, under the Trustee Relief Act, and her representatives now petitioned for the payment out to them thereof.

Dickinson, Q.C., and *Bardswell*, for the petitioners: This is an original and not a substitutional gift, and the authorities have now established that in the case of such a testamentary gift to the issue of a person who shall have died or may be dead "leaving issue," the parent must leave some issue surviving him, but if he leaves one, then all his issue take whether they survive the parent or not: *Martin v. Holgate* (¹); *Bolton v. Beard* (²); *In re Orlebar's Settlement* 667] *Trusts* (³); *M'Lachlan v. Taitt* (⁴). *In re Orlebar's Settlement Trusts* (⁵) is not touched by *Selby v. Whittaker* (⁶). The only possible doubt is caused by a *dictum* of Vice-Chancellor Kindersley in *Lanphier v. Buck* (⁷), but the actual decision itself was in favor of our contention, and this *dictum* cannot be regarded in the face of the actual decisions the other way. The representatives of Mrs. Chilton are accordingly entitled to have the fund in court paid out to them.

O. L. Clare, for the respondents, who were persons representing the share of Mrs. Farquhar, submitted that the *dictum* in *Lanphier v. Buck* was precisely in point. In that case Vice-Chancellor Kindersley said: "I must, however, observe with reference to this point, that there are cases where, although the gift to the issue (or children) is an original gift, the testator has by his language precluded children from taking who did not survive their parent. Thus, if the gift had been to such of the nephews and nieces as should be living at the happening of a certain event, and to the issue of such of the nephews and nieces as should have previously died leaving issue; those words would be a sufficient indication of the testator's intention, that such children only

(¹) Law Rep., 1 H. L., 175.

(²) 3 D. M. & G., 608.

(³) Law Rep., 20 Eq., 711; 15 Eng. R., 568.

(⁴) 2 D. F. & J., 449.

(⁵) 6 Ch. D., 239; 22 Eng. R., 784.

(⁶) 2 Dr. & Sm., 499.

as were left by their parent, that is, as survived their parent, should take."

HALL, V.C.: After the different decisions referred to, to which I may add the decision in *In re Pell's Trusts* (*), one of the authorities which settled the disputed point as to the necessity of the party to take surviving the tenant for life (I do not say his own parent), a point as to which there had been great difference of opinion, Lord Justice Knight Bruce, considering that the party to take must survive, I think it would not be sound reasoning to say that if there be a gift to the issue of children who shall have died leaving issue, the only objects of the trust are the issue that are surviving. To hold that because the expression "leaving issue" is used, the issue who are left surviving are the only issue who can take, would be to introduce into the words descriptive of the issue *the word "surviving," or other words limiting [668 the issue to those who survive their parent, the word "leaving" being applicable only to the parent. In many cases—and if you read it thus in one you must so read it in all—the consequence would be to leave totally unprovided for persons who would be reasonable objects of the testator's bounty. I therefore consider that keeping to the words of this trust, which, it must be remarked, is an original gift, I must hold, upon the authorities, that the issue of children take without regard to the question whether they (the issue) do or do not survive the parent, if any issue survive the parent. I say that the *dictum* in *Lanphier v. Buck* (†) will not be followed by me unless it should receive the approval of the Court of Appeal. I come to this conclusion after considering the cases of *Crause v. Cooper* (‡) and *In re Bennett's Trusts* (†), before Vice-Chancellor Wood, which were in reality decided while the cases bearing on the question now before the court were in a very unsettled state, and in which the Vice-Chancellor, looking, as I collect, to the then state of the authorities, certainly seems to have adopted the view that the party to take must survive his own parent.

Solicitors: *Burton, Yeates & Hart.*

(*) 3 D. F. & J., 291.

(†) 2 Dr. & Sm., 499.

(‡) 1 J. & H., 207.

(§) 3 K. & J. 280.

[7 Chancery Division, 669.]

Fry, J., Nov. 13, 28, 1877.

669]

*SHAW V. FORD.

[1874 S. 120.]

Will—Construction—Executory Devise—Alteration of Devolution of Estate at Moment of Devolution only—Condition repugnant to prior Gift.

A testator devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund and be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. And, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, and afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren and to their heirs and assigns, to be divided equally among them:

Held, that the four sons took the houses as tenants in common in fee, and that the executory devise over to their children was void.

The rules which regulate the validity of executory devises discussed.

WILLIAM SHAW, by his will, dated the 31st of March, 1836, devised as follows:—

“I do hereby give, devise, and bequeath unto my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, share and share alike, all and every of those my thirteen dwelling houses situate in Wood Street and Perry Bank, Lane End, in the parish of Stoke-upon-Trent, together with a pew in the south aisle of Lane End Church, to have and to hold subject to the following conditions: First, it is my will and desire that none of the afore-mentioned houses or lands, with the exception of my large garden in Perry Bank, be disposed of either by division, assignment, transfer, or sale, without the written consent and approbation of each and every of them my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, their heirs, assigns, or representatives. Secondly, it is my will and desire that, 670] if need be, the afore-mentioned garden be sold to meet contingent expenses: and furthermore, it is my will and desire that, until the before-mentioned distribution of the property is made, the rents and proceeds shall come into one common fund, and be divided equally amongst my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, namely, at Midsummer and Christmas, first de-

ducting all reasonable and necessary charges for the proper maintenance and good repair of the aforesaid property, which repairs are to be deducted out of the rents. Furthermore, it is my will and desire that, if there should be no lawful distribution of this my property during the natural life of them my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, it shall then devolve to the children lawfully begotten of them my four sons. And, in case any of these my four sons should die without issue, then it is my further will and desire that the half-yearly share of the rents so possessed or intended to be possessed by them or him shall in that case devolve to the widow or widows of such deceased son or sons, to be by them received and enjoyed so long as they retain their widowhood, and afterwards it shall devolve to the survivor or survivors of my other sons, that is to say, to my grandchildren and to their heirs and assigns, to be divided equally amongst them, share and share alike And, as to all the rest, residue, and remainder of all my estate and effects whatsoever and wheresoever not hereinbefore effectually disposed of, I do hereby give, devise, and bequeath the same to be equally divided amongst my four sons, Thomas Shaw, John Shaw, William Shaw, and Jesse Shaw, share and share alike." And the testator appointed his sons Thomas Shaw and John Shaw executors of his will. The testator died in August, 1837, and his will was afterwards proved by the executors. All the four sons survived him. By a deed dated the 4th of October, 1838, and made between Jesse Shaw and Eleanor his wife of the first part, John Shaw of the second part, William Shaw of the third part, Thomas Shaw of the fourth part, and Frederick Bishop of the fifth part, and duly acknowledged by Eleanor Shaw, Jesse Shaw (with the written consent of Thomas, John, and William) granted, and Eleanor Shaw released to Bishop and his heirs, the undivided share of Jesse Shaw under the will of the testator in the thirteen dwelling *houses, with the land thereunto [671] belonging, to hold the same unto Bishop and his heirs, to the use of Thomas Shaw, his heirs and assigns forever. And by the same deed Thomas Shaw (with the written consent of John, William, and Jesse) granted unto Bishop and his heirs all the undivided share of Thomas under the will of the testator in the same hereditaments, to hold the same unto Bishop and his heirs, to the use of Thomas Shaw, his heirs and assigns forever. William Shaw died in 1846 intestate, leaving the plaintiff George Shaw, his eldest son, and three other children him surviving. John Shaw, by

his will, dated the 3d of February, 1851, devised all his real estate to trustees on certain trusts, and he died on the 4th of November, 1853. Thomas Shaw, by his will, dated the 14th of September, 1858, devised his real estate to trustees on certain trusts for the benefit of his wife and children, and he died in 1859.

The bill in the suit was filed in April, 1874, by George Shaw against grandchildren and great-grandchildren of the testator, and it prayed that the rights and interests of all parties interested in the thirteen houses, with the land attached thereto (other than the garden at Perry Bank), devised by the testator's will, might be ascertained and declared by the court; that the houses might be sold under the direction of the court, and the proceeds of sale divided among the persons interested therein according to their respective interests, or that a partition of the property might be made.

Fischer, Q.C., and *H. M. Williams*, for the plaintiff and defendants in the same interest: The four sons took the thirteen houses as tenants in common in fee, and the executory devise over is void: *Shailard v. Baker* (¹); *Muschamp v. Bluet* (²); *Holmes v. Godson* (³); *In re Stringer's Estate* (⁴); *Jarman on Wills* (⁵).

Dryden, for grandchildren: The sons took only estates for life, with remainder to their children in fee. The result [672] of the plaintiff's contention is to *make several parts of the will inoperative. The testator is dealing at one time with corpus and at another with income, and this has created a confusion. "Lawful distribution" must be taken to refer to a physical distribution, as, for instance, by a partition.

Sladen, for another grandchild: Nothing is more common than an executory devise over in the event of the first taker having no children. Though there is no express gift of life estates to the sons, the intention evidently was to give estates in fee to the grandchildren.

Fischer, in reply: "Lawful distribution" refers not only to a physical distribution, but to a severance by a sale or by a devise by will.

Nov. 28. FRY, J.: The question in this case arises on the will of a testator of the name of William Shaw, and it is shortly this: whether or not a certain executory devise is valid or invalid, the plaintiff asserting its invalidity, and

(¹) 2 Cro. Eliz., 744.

(²) Sir J. Bridg., 132.

(³) 8 D. M. & G., 152.

(⁴) 6 Ch. D., 1; 22 Eng. Rep., 602.

(⁵) 3d ed., vol. ii, p. 265.

some of the defendants asserting its validity. [His Lordship stated the provisions of the will, and continued :]

Now, the first question is what estate do the four sons take in this specifically devised property, before we come to that portion of the will which gives it over in the event of there being no lawful distribution? In my opinion the sons take estates as tenants in common in fee simple. I think that it is clear they take, if at all, as tenants in common, because they are to take "share and share alike." The only question which requires any attention is, whether they take for life or in fee simple. I am of opinion that the expression of the testator's desire that none of the houses be disposed of either "by division, assignment, transfer, or sale without the written consent of each and every of the four sons, their heirs, assigns, or representatives," shows that the testator considered the heirs of the four sons as having an estate in the property, which they could only have in the event of its being a fee simple estate. There is, in my opinion, a devise of this particular property to the four sons as tenants in common in fee.

*Then comes the devise over which I have already [673 read. It will be observed that the terms are, "if there should be no lawful distribution of this my property during the natural life of these my four sons," and then it is given over in a certain way the details of which I will not repeat.

Now, it is to be observed that the period during which the contingency there referred to may arise is "the natural life of the four sons," that is to say, the period of the joint lives of all the four sons. The next inquiry is, what is the nature of the event which constitutes the contingency upon which the executory devise is to take effect. It is if there is no lawful distribution of the property amongst the four sons, in other words, in the absence of a partition during their joint lives. Now the right of all the tenants in common of an estate is, if they so think fit, to enjoy it, not in severalty, but as tenants in common of an undivided estate; and therefore the contingency, in its nature, is the exercise of a right which attaches to every tenant in common of an undivided estate.

The next inquiry is, at what period is that executory devise over to take effect, if at all. The answer is that it is to take effect at the death of each of the four sons. It is quite true, as I have already pointed out, that the period during which it may arise is that of the joint lives, and therefore it will take effect with regard to the son who dies first at

the very moment when the contingency is determined, but with regard to the other sons the contingency will be determined at an earlier period than their deaths, though the devise will come into operation at the death of each of them respectively.

Now that being so, I have to inquire what are the general principles of law applicable to such a case? They may, I conceive, be stated in this way. *Prima facie*, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety [674] *between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Gulliver v. Vaux* ('); *Holmes v. Godson* ('); and *Ware v. Cann* ('). Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley v. Peixoto* ('), *Ross v. Ross* ('), and *In re Yalden* ('). It is true that in some of the earlier cases, such as *Doe v. Glover* (') and *Watkins v. Williams* ('), a distinction was taken between realty and personality, but that was over-

(') 8 D. M. & G., 167 n.

(') 8 D. M. & G., 152.

(') 10 B. & C., 433.

(') 3 Ves., 324.

(') 1 Jac. & W., 154.

(') 1 D. M. & G., 53.

(') 1 C. B., 448.

(') 3 Mac. & G., 622.

ruled in *Holmes v. Godson*, and it never had anything in the nature of principle or reason to support it. I think, therefore, that these exceptions to the general rule are well established.

That being so, it only remains to be observed that the executory devise in the present case is within both of these exceptions. It is within the first, because, as I have pointed out, although the period during which the contingency is to be determined is that of the joint lives of the four sons, the time at which the devise over is to take effect is the death of each of the sons, that is, the moment when the estate devolves. It takes effect at the moment *of devolution, [675 but at no other time, and altering, as every executory devise must alter, the course of devolution, it is bad upon that ground. It is equally bad under the second exception, because the event upon which it is to take effect is the exercise of a right which is incident to the estate in fee simple already given to the tenants in common, namely, the right to enjoy without alienation. It is bad as being a gift over upon the exercise of that right.

For these reasons I hold that the plaintiff's contention is correct. I make a declaration to the effect that the devise over is bad, and that the four sons took estates as tenants in common in fee simple. There will be a decree for sale and distribution of the fund.

Solicitors: *H. G. Field; C. G. Scott.*

[7 Chancery Division, 675.]

Fry, J., Nov. 29; Dec. 1, 8, 1877.

MCKENZIE V. HESKETH.

[1876 M. 130.]

Specific Performance—Mistake—Compensation.

The plaintiff offered to take a lease of a farm belonging to the defendant at a rent of £500 per annum, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 249 acres. The defendant's agent desired to let only 214 acres with this farm, but he accepted the plaintiff's offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the defendant's agent admitted in examination that he thought the plaintiff had tendered for the same quantity of land as the former tenant. The plaintiff commenced an action for specific performance against the defendant, and was willing to take a lease of the 214 acres at a proportionately reduced rent:

Held, that the defendant must grant the plaintiff a lease of 214 acres at a rent reduced from £500, in the proportion of 214 to 235.

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THIS was an action to enforce specific performance of an alleged agreement by the defendant, Sir T. G. F. Hesketh, to grant a lease of a farm to the plaintiff.

The defendant was the tenant for life in possession, with powers of leasing, of an estate called the Easton Neston estate, in Northamptonshire. In December, 1875, and Jan-676] uary, 1876, Mr. Frederick *Gray, the defendant's agent, on his behalf, issued advertisements in the newspapers inviting tenders for the leases of some of the farms on the estate. By these advertisements applicants for leases were directed to apply for particulars of the farms to Mr. A. E. Greville, the plaintiff's solicitor, at Towcester, and printed forms of tender were prepared containing the conditions of letting, and in which blanks were left for inserting the name, situation, and acreage of the farm tendered for. In each tender there was a schedule intended to be filled up with a detailed description of the land comprised in the farm, with the culture and acreage of each field. The first two pages of the tender contained the name and general description of the farm and the terms of letting, the third page contained the schedule, and the fourth page contained the form of tender which was to be filled up by the person making the tender with his name and the amount of rent which he offered. It was intended that the description of the farm on the first page and the schedule should be filled up before the form of tender was issued by Mr. Greville. Before issuing the advertisements Mr. Gray had consulted the plaintiff, who was a land surveyor, and a Mr. Dean, another surveyor, with regard to the re-arrangement of the farms before the proposed letting. One of the farms proposed to be let was called the Wood Burcote Farm, and was in the occupation of a Mr. Ayers, whose tenancy was about to expire at Michaelmas, 1876. This farm consisted of 214A. 1R. 13P. lying altogether, and Ayers also occupied some outlying parcels of land containing 21A. 0R. 38P. Mr. Dean advised the defendant that these outlying parcels should be taken away from this farm, and that only the 214A. 1R. 13P. should be let to the next tenant. The plaintiff advised that the outlying parcels should be taken away, but that in lieu of them two adjoining fields, containing respectively 18A. 3R. 26P. and 16A. 2R. 7P., which had respectively previously formed part of two farms known as Manning's Farm and Elliott's Farm, should be added to the Wood Burcote Farm, making the total acreage thereof 249A. 3R. 6P.

The printed forms of tender were ordered by the plaintiff, and were, after they were printed, forwarded by him to Mr.

Gray. It appeared, however, that the plaintiff retained one of the printed forms in his own possession. Two tenders were sent in for the *Wood Burcote Farm, one by [677 the plaintiff and one by Ayers. The plaintiff's tender commenced as follows: "Particulars and terms of letting the Wood Burcote Farm, situate on the Easton estate in the parishes of _____, in the county of Northampton, containing homestead and about 249A. 3R. 6P. of land, with appurtenances, now in the occupation of Mr. John Ayers." The schedule was filled up with the descriptions and acreage of the several fields comprising the farm, and in it were included the two fields containing respectively 18A. 3R. 26P. and 16A. 2R. 7P., which the plaintiff had advised should be added to the farm, but the two outlying parcels occupied by Ayers were excluded. The total acreage was stated to be 249A. 3R. 6P. The tender on the fourth page was: "I, Alexander McKenzie, do hereby offer the sum of £500 rent per annum for the farm known as the Wood Burcote Farm on the Easton Weston estate, Northamptonshire, with appurtenances, as described in the foregoing schedule, subject to the conditions specified." This was signed by the plaintiff, and was dated the 21st of January, 1876. The blanks in the form and the schedule had been filled up by the plaintiff himself. The tender of Ayers was for the farm as he held it with the outlying parcels, making a total acreage of 235A. 2R. 11P., and his offer was a rent of 37s. per acre. The tenders were opened on the 2d of February, 1876, and Dean made a calculation for the assistance of Gray, showing that the rent offered by Ayers came to £436 12s. Gray assumed that the plaintiff's offer of £500 was for the same land, and on the 3d of February Mr. Greville, by Gray's direction, wrote to the plaintiff, informing him that his tender had been accepted. When Mr. Gray determined to accept the plaintiff's tender he had only looked at the name of the farm tendered for and at the rent offered, and he was not aware that the plaintiff had included in his tender the two fields formerly let as part of Manning's and Elliott's Farms. Mr. Gray had already agreed to let the field of 16A. 2R. 7P. (formerly Elliott's) to another person. The error was discovered the next day, and Mr. Greville then informed the plaintiff of it, and suggested that he should make another tender. The plaintiff insisted on his agreement, and commenced the action to enforce specific performance.

By his statement of defence the defendant denied that he, or *any one authorized on his behalf, ever agreed to [678 grant such a lease as that claimed by the plaintiff, and said

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McKenzie v. Hesketth.

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that it was not intended by Gray or Greville that the tenders for the Wood Burcote Farm should be accepted except for the 214A. 1R. 13P.

This was the trial of the action. Gray was examined as a witness, and said that he intended to let only the 214A. 1R. 13P. as the Wood Burcote Farm. But he admitted that he did not look at the amount of the acreage for which the plaintiff tendered, and said that he supposed that his tender was for the same quantity as that for which Ayers had tendered; and that he accepted the plaintiff's tender simply because the rent offered by him was higher than that offered by Ayers.

Cookson, Q.C., and *Ratcliffe*, for the plaintiff: If the defendant's agent made a mistake, that is no reason why the contract should not be enforced. If a contract is ambiguous in its terms it may be a good defence to an action for specific performance that the defendant understood it in a different sense from the plaintiff: *Manser v. Back* (*). But the plaintiff's tender was free from any ambiguity, and it is no defence that the defendant's agent did not read it, or misunderstood its meaning: *Swaistland v. Dearsley* (*). *Wycombe Railway Company v. Donnington Hospital* (*) does not conflict with those decisions. At law, if a mistake had been made by the agent, the principal would be liable in an action of tort: *Seymour v. Greenwood* (*); *Limpus v. London General Omnibus Company* (*). In *Alvanley v. Kinaird* (*) a mistake had been made by the vendor's agent as to whether some mines were to be included in the property sold, and it was held that the purchaser was entitled, if he wished it, to have specific performance of the contract excluding the mines. The present plaintiff desires to have a lease of the 214 acres, with compensation by means of an abatement in the rent of £500 in the proportion which 214 bears to 249: *Leslie v. Thompson* (*). The *onus* is on the vendor to show why the contract should not be performed. 679] [FRY, J., referred to *Malins v. Freeman* (*).]

North, Q.C., *Bury*, and *Mugliston*, for the defendant:

[FRY, J.: Can you resist a decree for specific performance, taking 235A. 2R. 11P. as the basis for a rent of 500?]

We cannot assent to that.

[*Radcliffe*: The plaintiff is willing to take a decree in that form.]

(1) 6 Hare, 443, 447.

(2) 29 Beav., 430.

(3) Law Rep., 1 Ch., 268.

(4) 6 H. & N., 359; 7 H. & N., 355.

(5) 1 H. & C., 526.

(6) 2 Mac. & G., 1.

(7) 9 Hare, 268.

(8) 2 Keen, 25.

The case is one of mutual mistake; the parties never meant the same thing.

[FRY, J.: The plaintiff being willing to take the less quantity at a proportionate reduction of the rent, does not *Alvanley v. Kinnaird* (') show that he is entitled to a decree to that extent?]

In *Alvanley v. Kinnaird* the decree was made without compensation.

[FRY, J.: I do not see the equity for that in the present case. It is a mere question of acreage.]

The mistake is a complete answer to an action for specific performance: *Swaishland v. Dearsley* ('). The form of the tender justified the mistake. If there was a mistake it is immaterial, except on the question of costs, whose conduct led to it. And the result is the same whether the defendant can or cannot perform the contract in part. The question is whether anything at all like the contract which was made can be performed. We do not, of course, object to give the plaintiff a lease of the 214 acres at a rent of £500. Either there was no contract in the present case, because the parties were never *ad idem*, or the mistake was of such a nature that a court of equity will not enforce specific performance. If by reason of a mistake the actual contract was not that which was intended by one of the parties, the court will not substitute a different contract: *Calverley v. Williams* ('); *Wycombe Railway Company v. Donnington Hospital* ('); *Webster v. Cecil* ('); *Day v. Wells* ('); [680 *Garrard v. Frankel* ('); *Wood v. Scarth* (').

[FRY, J.: Is there any reported case in which it has been held that mistake is a complete answer to a suit for specific performance, when the mistake is with reference to a matter which, if there were no mistake, would be a proper subject for compensation? *Bloomer v. Spittle* (').]

The plaintiff says he agreed to take 249 acres, at a rent of £500; the defendant's agent says he only consented to let 214 acres, for £500. Why should the defendant be compelled to let more than his agent consented to let at that rent? If I am to let 235 acres, I ought to have compensation. It is impossible to adjust the compensation fairly to both sides.

Cookson, in reply: The mistake of one party to the con-

(¹) 2 Mac. & G., 1.

(²) 29 Beav., 480.

(³) 1 Ves., 210.

(⁴) Law Rep., 1 Ch., 268.

(⁵) 30 Beav., 62.

(⁶) 30 Beav., 220.

(⁷) 30 Beav., 445.

(⁸) 2 K. & J., 38, 42.

(⁹) Law Rep., 13 Eq., 427; 2 Eng. R., 372.

tract is not a sufficient defence: *Smith v. Hughes* (¹); Pollock on Contracts (²). All cases of compensation must be cases of mistake. I only ask for 214 acres, though I am willing to take 235, and I ask that the rent may be apportioned by a simple rule of three sum. The mistake does not affect the *corpus* of the contract, and therefore it is a fit subject for compensation: *Powell v. Elliot* (³).

[FRY, J.: The court seems to have dealt with contracts made by agents more tenderly than with contracts made by principals.]

An agent will not be permitted to blunder with impunity where a principal would not. The principal has his remedy against his agent.

FRY, J.: The plaintiff sues for the specific performance of an agreement for a lease which, he says, was contained in a tender made by him and a letter of acceptance written by the defendant's agent. Two questions arise—1. Whether there was any concluded contract between the parties; 681] 2. Whether, if there was a concluded contract, *there was such a mistake on the part of the defendant's agent as will justify the defendant in resisting the specific performance of the contract. The tender was made upon a printed form which had been prepared by the plaintiff himself, and was adopted by Mr. Gray, who was acting as the defendant's agent. [His Lordship referred to the plaintiff's tender, and the letter of acceptance of the 3d of February, 1876, and the other facts above stated, and continued:]

The only argument which can be adduced by the defendant to show that there was no concluded contract is that the whole 249 acres is described in the plaintiff's tender as being land in the occupation of Ayers, but I do not think it is a tenable argument. The land for which the plaintiff tendered was fully described in detail by its proper acreage, and no person reading the instrument with due care and with a knowledge of the surrounding facts could have had any doubt what it was for which the plaintiff was tendering. I think, therefore, that there was a valid contract concluded between the parties.

The second question is a more difficult one. It appears to me that Mr. Gray was the agent of the defendant for the purpose of determining whether this farm should be let to the plaintiff or not; he was acting under a power of attorney, and he was assisted by Mr. Greville and Mr. Dean. A great number of tenders were opened on that day, and they

(¹) Law Rep., 6 Q. B., 597.

(²) Page 394.

(³) Law Rep., 10 Ch., 424; 11 Eng. Rep., 488.

were all, as I conclude from the evidence, opened by Mr. Gray himself. Before the plaintiff's tender was opened, one of the closes comprised in it, containing upwards of sixteen acres, had been let to another person, and it was, therefore, impossible that it could be let to the plaintiff. There were only two tenders for the Wood Burcote Farm, viz., those made by Ayers and the plaintiff. Ayers' tender was opened first, and it was a tender for the Wood Burcote Farm and 235A. 2R. 11P. of land, and he offered to pay a rent of 37s. per acre. That offer was considered and thought insufficient. Then the plaintiff's tender was opened, but the amount of acreage for which he offered was not looked at or considered at all. This was very culpable negligence on the part of the defendant's agent. The plaintiff's offer of a rent of £500 was considered. Mr. Dean made a calculation and came to the conclusion that Ayers' offer would give a total rent *of £436. This amount was compared [682 with the plaintiff's offer of £500, and Mr. Gray at once determined to accept the plaintiff's offer, and he then authorized Mr. Greville to write the letter of acceptance. Mr. Gray's evidence was distinct that he supposed that the plaintiff was tendering for the same thing as that which was included in the offer of Ayers, i.e., 235A. 2R. 11P., and there is no other evidence that Mr. Gray knew what was the acreage of Ayers' farm. A blunder was made by Mr. Gray, for the plaintiff's offer was not for that for which Gray thought it was, and under this mistake he accepted the plaintiff's offer. Then arises the question, What is the effect of that mistake? It is contended on behalf of the defendant that the effect is to enable him absolutely to refuse the contract, except upon the terms of receiving a rent of £500 for 214A. 1R. 13P. The plaintiff, on the other hand, contends that he is entitled to require the defendant to grant him a lease of the 214A. 1R. 13P. at a reduced rent by way of compensation for the deficiency of the acreage. In my opinion the plaintiff's contention is well founded. It appears to me that the mistake is not one which goes to the *corpus* with which the contract deals; it is not a mistake as to the essential terms of the contract. A mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms to be made the subject of compensation. If the incapacity of the defendant to perform this contract had arisen from some other cause, such as the act of God, that would clearly have been a

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proper subject of compensation, and I think it is not the less so because the incapacity arose from a blunder of the defendant's agent. I hold, therefore, that the defendant must grant the plaintiff a lease of the 214A. 1R. 13P., and that the rent of £500 must be reduced in the proportion which that quantity bears to 235A. 2R. 11P., because I come to the conclusion that Gray accepted the plaintiff's tender as being an offer for the quantity for which Ayers had tendered. The defendant must pay the costs of the action.

Solicitor for plaintiff: *Robert Helsham*.

Solicitors for defendant: *Sharp & Ullithorne*, agents for Greville & Edwards, Towcester.

[7 Chancery Division, 683.]

Fry, J., Nov. 17; Dec. 8, 10, 1877.

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[1877 H. 92.]

Specific Performance—Conditional Contract—“Subject to the approval of the Title by the Purchaser's Solicitor.”

A contract for the purchase of a lease stated that it was made “subject to the approval of the title by the purchaser's solicitor”:

Held, that, in the absence of *male fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title.

THIS was an action for the specific performance of an agreement by the defendant to purchase the lease of a house from the plaintiff.

The alleged contract was contained in the following written memorandum, which was signed by the plaintiff, and delivered by him to the defendant:—

“February 12, 1877.

“Received of Mr. S. Buck” (the defendant) “this day the sum of £20 in respect of Arkley Copse, near Barnet, as a deposit on the purchase of the lease, with possession upon completion, for the sum of £680, and subject to the transfer of the mortgage now upon the property, and also the approval of the title by Mr. Buck's solicitor.

“(Signed) W. C. Hudson.

“Purchase-money £1,600

“Less amount of mortgage at this date 920

£680”

Arkley Copse consisted of a villa and garden attached thereto. On the 20th of February, 1877, an abstract of the plaintiff's title was sent by his solicitors to Mr. Jennings, the defendant's solicitor. By this abstract it appeared that the villa called Arkley Copse was, together with an adjoining house and garden, demised by an indenture dated the 20th of October, 1853, by Richard Durant to G. W. Miller for a term of ninety-nine years from the 29th of September, 1852, at the yearly rent of £10. The lease contained a covenant by the lessee not to erect any other buildings on the land without the license of Durant, his heirs or assigns, first *obtained for that purpose, and subject expressly to [684 such reserved annual rent or premium which he or they should place thereon.

By an indenture dated the 2d of August, 1875, the premises comprised in the lease of the 20th of October, 1853, became vested in the plaintiff for the then unexpired residue of the ninety-nine years' term. By an indenture dated the 3d of August, 1875, the plaintiff assigned the adjoining villa and garden to A. S. Josling for the then residue of the ninety-nine years' term, subject to the payment of a yearly rent of £5 (a moiety of the yearly rent of £10 reserved by the original lease) and to the covenants contained in that lease. No apportionment was then made of the £10 rent or of the covenants contained in the original lease, but a power of distress was given to Josling over the adjoining premises (Arkley Copse) in case the £5 rent remaining payable by the plaintiff in respect thereof should be in arrear for twenty-one days.

On the 4th of August, 1877, the plaintiff mortgaged Arkley Copse to a building society for £1,100, which was to be repaid in monthly instalments.

On the 22d of February, 1877, the defendant's solicitor wrote to the plaintiff's solicitors as follows:—

“I beg to acknowledge receipt of abstract of title and to say that I do not approve of title to the house contracted to be sold to my client as thereby deduced.

“The lease contains other property than that sold, and there has been no legal apportionment with the lessor of rent or covenants, &c. The lease also contains restrictive covenants as to building, with power to lessor to increase the rent.

“By the terms of the mortgage as abstracted, it appears that the £180 paid by vendor is not for principal only, but that a very trifling portion thereof (if any) would be put to principal account.

"Under these circumstances, therefore, my client instructs me to proceed no further in the matter, but to ask that the deposit money paid by him may be returned."

Further correspondence took place between the solicitors, and on the 1st of March, 1877, the defendant's solicitor wrote to the plaintiff's solicitors as follows:—

"I have now seen my client and am instructed to say that 685] the *facts relating to the mortgage and the material facts relating to the title were not fully explained to him, nor were then entered into and thoroughly understood by him . . . As to the title, it is particularly expressed as subject to Mr. Buck's solicitor's approval. I have to repeat that I do not approve of the title as deduced by abstract delivered, the covenant as to future erections being of a most objectionable character where more than one property is held under the same lease. And further, the rent and covenants not being apportioned, the purchaser cannot be advised to accept the title with such liabilities. In the present defective state of the title, I submit that it is useless for me to proceed to incur additional expenses. My client agreed to purchase the property for a residence only, and unless my objections are satisfactorily removed within fourteen days from this date, my client will be compelled to seek other premises, and will consider that the vendor is unable or unwilling to furnish a good and satisfactory title, and will take proceedings to recover his deposit and the expenses to which he has been put."

The plaintiff did not within the fourteen days obtain any binding agreement on the part of the ground landlord for the apportionment of the rent and covenants in the original lease. On the 6th of March, 1877, the writ in the action was issued.

The defendant did not, in his statement of defence, plead the Statute of Frauds. Some time after the issue of the writ the plaintiff obtained the consent in writing of the ground landlord to an apportionment of the rent and covenants of the original lease.

This was the trial of the action.

Cookson, Q.C., and *Shebbeare*, for the plaintiff: We have satisfactorily answered the objection as to the mortgage.

As to the objection in regard to the covenant, the purchaser of a lease takes it subject to all the covenants contained in it. He ought to inquire what they are: *Hall v. Smith* (*); *Grosvenor v. Green* (*); *Martin v. Cotter* (*); *Wal-*

(*) 14 Ves., 426.

(*) 28 L. J. (Ch.), 173.

(*) 3 J. & Lat., 496, 506.

ter v. Maunde ('); *Cosser v. *Collinge* ('); *Smith v. [686 Capron* ('); Sugden's Vendors and Purchasers ('). The law in this respect has not been altered by the recent case of *Hyde v. Warden* ('). The covenant is not an unusual one. At any rate, we are now able to procure an apportionment of the rent and covenants. The fact that the contract is made subject to the approval of the defendant's solicitor means nothing more than the law would imply in the absence of any such stipulation. It only means that a good title must be shown by the vendor. *Williams v. Edwards* ('), which may be relied on by the defendant, was quite a different case.

Fischer, Q.C., and *Hemings*, for the defendant: The approval of the title by the defendant's solicitor is an essential term of the contract. That approval has never been given. The object was to prevent the necessity of any application to the court, and the solicitor has acted *bona fide*. This is a sufficient answer to the action: *Williams v. Edwards*.

[FRY, J.: There the agreement was that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by the time appointed for the completion of the purchase.]

The effect of our stipulation is the same.

[They were stopped by the court.]

Cookson, in reply: *Williams v. Edwards* is distinguishable. The objections made by the defendant's solicitor are unreasonable, and therefore the condition does not apply: Sugden's Vendors and Purchasers ('). The solicitor had no power to make time of the essence of the contract.

FRY, J.: The plaintiff seeks the specific performance of a contract which is expressed in a memorandum dated the 12th of February, 1877, *and signed by the plaintiff. [687 [His Lordship read the memorandum, and referred to Mr. Jennings' letter of the 22d of February, and continued:]

This gives rise to the inquiry, what is the true meaning of the words "subject to the approval of Mr. Buck's solicitor." It is contended on behalf of the plaintiff that they are merely the expression of that which the law would imply if they had not been inserted, and that therefore they operate nothing. What, then, does the law imply in the case of a contract for the sale of leasehold property? It implies that the vendor shall make a good title to the property. Is that the same thing as a stipulation that the contract shall be subject

(') 1 Jac. & W., 181.

(') 3 My. & K., 288.

(') 7 Hare, 185.

(') 14th ed., p. 7.

(') 3 Ex. D., 72.

(') 2 Sim., 78.

(') 14th ed., p. 342.

to the approval of the title by the purchaser's solicitor? It appears to me that it is not. Observe the difference between the results in the two cases. In the one case the approval or disapproval of the person specified is, in my opinion, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shown. In the other case the goodness of the title may be a matter for the decision of the court. It might come first before this court, then before the Court of Appeal, and lastly before the House of Lords. In all these courts the question of the title might be discussed, and possibly with varying results. Moreover, the title might be the subject of reference to the Chief Clerk in chambers, and upon his findings interlocutory applications might be made to the court, and in this way the final decision of the matter might be indefinitely protracted. It appears to me that it is not unreasonable to suppose that the purchaser should desire to preclude the possibility of such a protracted litigation, and that he should intend to stipulate that the opinion of a particular person, his own solicitor, should be conclusive as to the sufficiency of the title deduced, and that, in the absence of compliance with that condition, the contract should not be capable of being enforced. It is not necessary to decide that the absence of approval by the purchaser's solicitor would be conclusive, if the purchaser himself had acted unreasonably, as, for instance, if he had declined to appoint any solicitor, or if the solicitor whom he appointed had insisted upon utterly unreasonable objections to the title. Possibly in such cases the purchaser would not be able to enforce the condition. It is not suggested *in the present case that the conduct of the purchaser himself has been in any respect unreasonable, and I have therefore to consider whether the objections taken to the title by his solicitor were unreasonable. [His Lordship referred to the objections raised in Mr. Jennings' letter of the 22d of February, and to the facts bearing upon them, and continued:]

It is admitted that no valid apportionment of the ground rent of £10 was made on the occasion of the assignment of the other house by the plaintiff in 1875, and that the whole rent of £10 could be raised out of the property purchased by the defendant, and it is admitted that no apportionment was made of the covenants contained in the original lease, one of those covenants being a covenant not to build upon any part of the land comprised in that lease without the license of the lessor, for which license he was to be at liberty

to require an additional rent to be paid. It is not contended that the fact that the two houses were comprised in the one lease at one rent, and subject to such covenants, was not a serious objection to the title, and a fatal objection if it could not be removed. But it is said that the objection was capable of being removed, and that the purchaser was bound to wait until the defect had been cured. If it had been shown that there was, before the expiration of the fourteen days fixed by Mr. Jennings' letter of the 1st of March, any binding contract on the part of the landlord, any written consent by him to an apportionment of the rent and covenants, the case would have been quite different. It is true that the purchaser's solicitor had been told that an apportionment of the rent and covenants could be obtained, but no binding agreement was entered into by the landlord until May. The objection was taken on the 22d of February; it was not then met by any evidence of the landlord's willingness to consent to an apportionment. On the 1st of March the purchaser's solicitor gave the vendor fourteen days to remove the objection, but no steps were taken to do so within that time. I am of opinion, therefore, that on the 22d of February there was a perfectly reasonable ground of objection to the title, and this objection was not removed until after the action had been brought. I hold that there was nothing unreasonable in the conduct of the defendant's solicitor, and that as the condition contained in the *contract has [689 not been fulfilled, the plaintiff's case fails. The defendant is entitled to judgment with costs. The deposit must be repaid with interest.

Solicitors for plaintiff: *R. Miller & Wiggins.*

Solicitor for defendant: *G. J. Jennings.*

See 18 Eng. Rep., 228 note; *ante*, p. 499 note.

The plaintiff, a sculptor, made a plaster bust of the deceased husband of the defendant, under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed, it was found that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject; and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection

in the work but by the nature of the material. Held, that the plaintiff was not entitled to recover.

As the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable: *Zaleski v. Clark*, 44 Conn., 318, 45 Conn., 397.

Appellee entered into the service of appellant under a written contract, providing, among other things, in a rule of the company, which was made a part of the contract, that "any employee wishing in good faith to leave the company's service, may do so at any time without giving previous notice." Under the provisions of this

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rule the right of appellee to quit appellant's employ before the expiration of his term of service is unquestioned. Language contained in another portion of the contract, "that he would not stop work," etc., cannot, in the light of the whole contract, be so construed as to make it an entire contract.

The good faith of appellee in leaving the employ of the company is presumed until the contrary is shown, yet the motive which induced him to this action is a matter to be fairly submitted to the jury, and hence the question asked a witness, whether he knew of appellee's joining any strike or combination for the purpose of causing the company to pay him or other miners an advance in wages was proper, and an answer should have been allowed: *Wilmington Coal Mining and Manufacturing Company v. Barr*, 2 Bradwell, 84.

A written contract, having no latent ambiguity, can neither be qualified nor controlled, enlarged nor diminished, by evidence of a contemporaneous parol understanding. Thus, where defendant addressed plaintiffs by writing, signed by him and plaintiffs' agent, requesting them to send him a set of milk pans, and saying, "I agree to pay you * * * if satisfied with the pans," it was held that evidence of an agreement between defendant and said agent as to the manner in which the pans should be tested, entered into at the time the written contract was drawn, and as part of the same agreement, was inadmissible.

If one order goods, agreeing to pay if satisfied therewith, he must, in ascertaining whether he is satisfied or not, act honestly, and in accordance with the reasonable expectations of the seller as implied from the contract—its subject-matter and surrounding circumstances. His dissatisfaction must be real and not pretended, to be available as a defence to an action for the contract price: *Daggett v. Johnson*, 49 Verm., 345.

A contract stipulated that on sixty days' notice it might be cancelled by either party for "good cause." Held, that the term "good cause" could not be reduced to legal certainty and was ineffectual, and that any revocation in good faith was sufficient: *Cummer v. Butts*, 40 Mich., 322, 325, and cases cited.

There is a distinction between the taking possession of an ordinary chattel, under a contract of sale, and such property as mill machinery, which is affixed to the purchaser's building or land. Therefore where, in an action brought to recover the value of certain mill machinery put in defendant's mill by plaintiff, under a contract, by the terms of which the machinery was to be put in complete operation to defendant's satisfaction, and it was shown that the whole of the articles contracted for were not delivered, nor was defendant ever satisfied, the jury were told that, having kept the machinery, the defendant was liable to pay whatever it was worth. Held an erroneous direction, and that the length of time the defendant used the machinery, the complaints made about it, and all the circumstances, should have been left to the jury, with a direction for them to consider whether, from the defendant's dealings with it, they could infer a new implied contract on his part to keep the machinery and pay what it was worth: *Waterous v. Morrow*, 2 Pugsley & Burbridge, New Brunswick, 11.

A wind-mill was bargained for, to be put up in good order and warranted for sixty days. It worked ill, and the vendors from time to time agreed to put it in proper condition, and endeavored to do so. Held, that the vendee's allowing it to remain meanwhile upon his land and using it at all times, did not amount to an acceptance; and that it was proper for the jury to take these facts into consideration to determine whether there had been a performance by the vendors, and an acceptance by the vendee: *Phelps v. Whitaker*, 37 Mich., 72.

Goods were forwarded for acceptance if satisfactory, but acceptance and payment was unreasonably delayed and the consignee meanwhile assigned.

Held that title had not passed and the goods were not covered, by the assignment: *Shipman v. Graves*, 41 Mich., 675.

The terms of a contract for the purchase of a steam engine, etc., having been talked over, were reduced to writing in the form of a correspondence between the parties.

In a letter of the 23d of July, 1870, S., the purchaser, informed the vendors that he would accept the proposi-

tion of their agent for the engine, etc., the same to be built, delivered and set up on the premises of S. in the city of Baltimore, at the expense of the vendors at the price mentioned — "the said engine to be run on thirty days' trial and to give perfect satisfaction." In consideration of which S. agreed to pay \$1,000 in cash at the expiration of the thirty days (if the engine proved satisfactory, and if not, to be made so, or moved at the expense of the vendors), and to give two notes of one thousand dollars each, at six and eight months from the date of the cash payment with interest.

In response to this proposition the vendors said by their letter of the 3d of August, 1870, that they would furnish the engine in thirty days, and would deliver and put it up as per letter of S. of the 23d of July, 1870, for \$3,000, the notes to be four and six months, instead of six and eight months. On the receipt of this letter of the 3d of August, 1870, S. informed the vendors that he was ready for the engine; and the engine and pump were accordingly put up by the vendors in October, 1870, and were retained in the possession of and used by S. until January, 1874, when he surrendered the premises to his landlord, and in consideration of the release of all claim for rent due, he transferred to him all the machinery, including the engine. The premises, including all the machinery thereon, were afterwards leased to another person.

It was in evidence that S. promised to pay for the engine, though he never said he was satisfied with it, and never accepted it—that the engine never worked to the satisfaction of S. There was no evidence that S. ever definitely rejected the engine, or that the vendors ever demanded its surrender with a view to its removal. In an action by the vendors against the executors of the assignee of S. to recover the value of the steam engine, etc., it was held:

1. That the time of the use and control of the machinery by S., in the absence of any new agreement, gave rise to the presumption, as matter of law, that the same had been accepted.

2. That if it were conceded that S. had a continuing option to reject the machinery as not being satisfactory, that option was determined and put an end to, and the sale became absolute

when he assumed to himself the right to assign the property to a third person.

3. That the plaintiffs were not entitled to recover: *Delamater v. Chappel*, 48 Md., 245.

Where there is a written guaranty of the successful operation of new machinery, the purchaser may try for a reasonable time before returning it to the vendor: *Providence Co. v. Lochiel*, etc., 2 Leg. Chron. Rep., 264, 31 Leg. Int., 341.

In an action for casks sold, it appeared that they had been sent, containing oil, to the defendant, with a notice that if they were not returned within a certain time, they would be charged for at a specified rate. Held, that after the expiration of that time the plaintiff need not declare on the special contract: *Johnson v. Kirkclady*, *Arnold & Hodges' Q. B.*, 7, overruling *Lyons v. Barnes*, 2 Stark., 37.

By an agreement between the parties, the plaintiff agreed to purchase a certain hay press from defendant for \$500, if it should be capable of pressing into bales ten tons of hay per day, which the defendant warranted it to be capable of doing; and on the faith of such warranty the plaintiff received it, incurred heavy expenses in paying freight, and making a trial of it, when it proved to be insufficient, and the defendant then, instead of allowing plaintiff to return it, urged further trials and delay which lasted for some weeks, when plaintiff returned it.

Held, that even if there was no absolute sale, but the machine was only sent on trial, with the warranty, the plaintiff was entitled to maintain an action for the breach of the warranty, and to recover such damages as legitimately flowed from the breach, as to which \$250, the amount found in this case, was not to be excessive.

Held also, that the warranty need not be in writing, for the machine having been sent to the plaintiff, and received and tested for weeks, the statute of frauds could not apply: *Northwood v. Rennie*, 28 U. C. Com. Pl., 202.

Upon a sale of a machine, with special written warranty, "guaranteeing it to do superior work and to be made of good material and durable, with proper care," with the further provision that "if the machine does not bear the guaranty, we (the war-

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rantors) are to be notified of the same at once, and if we fail to make the machine work well, or do not furnish another that will answer the guaranty, it may be returned." Held, that before the purchasers can hold the warrantors liable on this contract, the latter must have notice according to its terms, after reasonable trial, to the end that they may have the privilege of making the machine work if they can, or supply its place with another.

If the time for testing the machine be extended by parol, the same obligation rests upon the purchaser to give notice after the expiration of the time as extended; the contract not being changed in other respects: *Jackson v. Hubbard*, 1 Lea (Tenn.) Rep., 436.

In a suit to recover a salary under a contract of employment, "if satisfactory," a question whether the employee gave satisfaction to his employer

while employed, is considered too general, unless asked by way of introduction: *Kalamazo, etc., v. MacAllister*, 40 Mich., 84.

In an action against a town under the Gen. St., Ch. 44, § 22, to recover damage for injury to the plaintiff's horse occasioned by a defect in a highway on which the plaintiff was travelling, evidence that the plaintiff was commonly careful and skilful in driving is not admissible to show that when the accident occurred he was in the exercise of due care: *McDonald v. Town of Savoy*, 110 Mass., 49; *Morris v. East Haven*, 41 Conn., 253.

In an action for an injury caused by the alleged unskilful driving of a person, evidence of similar negligent acts on his part at other times is not admissible: *Maguire v. Middlesex, etc.*, 115 Mass., 289.

[7 Chancery Division, 689.]

Fry, J., Dec. 18, 1877.

AUSTIN V. AMHURST.

[1878 F. 75.]

Prescription—Custom—Profit a prendre—Occupiers—Copyholders—Manor.

The occupiers of lands under the copyholders of a manor claimed, and by a by-law were declared entitled to, certain rights of common over the lands of the manor. Part of the lands had been sold to a railway company, and the occupiers claimed to share in the purchase-money:

Held, that the claim could not be maintained. It could only be made by custom, by grant, or by prescription. There could be no such custom giving a *profit a prendre in alieno solo*; there was no grant; and there could be no right by prescription, inasmuch as the claim would be against the owner of the land in respect of which the claim was made.

THIS was an action on behalf of the "occupiers" of lands in the Manor of Lord's Hold in Hackney, claiming to share in certain sums of money paid into court on purchases by a railway company and by other companies, of lands within the manor. Under an order made in the suit of *Fox v. Amhurst* (1) the money was divisible amongst the copyhold and freehold tenants of the manor as therein mentioned. The present plaintiffs alleged that the "occupiers" had not been represented in that suit, and claimed as against the copyholders and freeholders to share in the money. There was no statement of the meaning of the word "occupiers," but

(1) Law Rep., 20 Eq., 408.

the occupiers appeared to be the tenants under the copyholders and freeholders. The facts of the case are sufficiently stated in the judgment of his Lordship.

Cookson, Q.C., and *Atherley Jones*, for the plaintiffs: The occupiers have by prescription rights over the lands of the manor, and the by-law merely recognizes these rights. In **Gateward's Case* (¹) there was nothing but custom; [690 *Cowlam v. Slack* (²) was a similar case: *Grimstead v. Marlowe* (³). The claim is to common appurtenant, of which the court will presume a grant: *Beau v. Bloom* (⁴); *Sacheverill v. Porter* (⁵); *Warrick v. Queen's College, Oxford* (⁶).

[FRY, J., referred to *Constable v. Nicholson* (⁷).]

Baylis v. Tyssen-Amhurst (⁸) was not a similar case.

Kekewich, Q.C., *Franklen*, *Elton*, and *Tyssen*, for the defendants, were not called upon.

FRY, J.: The plaintiffs come here in order to prove a certain right of common; but if it is apparent to my mind that the right of common alleged by them cannot have a legal existence, of course it would be a waste of time to hear the evidence upon that point. If, however, I am wrong in the view which I take as to the impossibility of such a right of common, the cause can be sent back to me for trial upon the question whether such a right of common is proved to exist.

The plaintiffs sue "on behalf of themselves and all other the occupiers of freehold and copyhold lands or tenements within the Manor of Hackney, called the Lord's Hold." The defendants are of two classes. The first five are trustees of certain funds which have arisen from the taking of part of the lands of the manor by a railway company and by other companies; and the remaining defendants represent copyhold tenants of the manor, or copyhold tenants whose lands have been enfranchised. The plaintiffs in effect are claiming against those defendants but in respect of the same lands; that is to say, they are claiming against their landlords to have an independent right of common in respect of the lands of which those copyholders and freeholders are the owners.

Now the exact nature of the right of common claimed it has *not been very easy to ascertain. The most exact [691 description that I am able to discover or to learn from the opening statement of the counsel for the plaintiffs is to be

(¹) 6 Rep., 59 b.

(²) 15 East, 108.

(³) 4 T. R., 717.

(⁴) 2 W. Bl., 926; 3 Wils., 456.

(⁵) Cro. Car., 482.

(⁶) Law Rep., 6 Ch., 716.

(⁷) 14 C. B. (N.S.), 230.

(⁸) 6 Ch. D., 500; 28 Eng. R., 109.

found in a by-law of the 28th of April, 1835, passed by the homage, and alleged by the plaintiffs to be an admission of their title. That by-law is very singular and is to this effect:—

“That every copyholder and freeholder of lands and tenements within this manor shall be entitled to common of pasture for one head of cattle for every £10 annual value of his said lands and tenements; provided always that the whole number to any one copyholder or freeholder shall not exceed thirty, and that such copyholder or freeholder shall, on or before the 12th day of August in every year, claim such right; in default of which claim the same shall be transferable to the occupiers of such lands or tenements respectively in ratable proportion in addition to their own rights as occupiers.

“That every occupier of any copyhold or freehold lands or tenement within this manor shall be entitled to common of pasture when his or her rent or annual value is at or under £10 a year to three head of cattle, £15 to six, £20 to nine, £25 to ten, £35 to eighteen, £40 to twenty-one, £45 to twenty-five, £50 to thirty, and one head only for every £5 above £50.”

Now that by-law undoubtedly seems to recognize a right of common in the occupier of a copyhold or freehold tenement, independent of and separate from another right of common in the copyholder or freeholder of the same tenement; and what is not the least singular part of the by-law, it transfers the right of the copyholder or freeholder to his occupier, unless before the 12th of August that copyholder or freeholder makes a certain claim.

That being the nature of the right alleged, the first inquiry is in what method is it claimed. It can be claimed only in one of three ways; by custom, by grant, or by prescription. It is not, and could not be, claimed by custom, because the claim is to a *profit a prendre in alieno solo*; and from *Gateward's Case* (1) down to the present time it has been established law that such a *profit a prendre* cannot be [692] claimed by custom. Grant is out of the *question, because no grant has been or can be produced. It remains, therefore, to inquire whether such a right can be claimed by prescription.

Now prescription, to use the language of Blackstone's Commentaries (2), must be “either in a man and his ancestors, or in a man and those whose estate he hath.” There is a third mode of prescription, which is apparently, but

(1) 6 Rep., 59 b.

(2) 23d ed., vol. ii, p. 264.

not really, a third, namely, claiming as a member of a corporation; that is however claiming in the first character, and the prescription there by the member of the body corporate is in right of that body as a person. I will, however, treat these as three modes of prescription, and I will inquire whether the plaintiffs can succeed on any one of them. In the first place they do not prescribe in themselves and their ancestors, because *non constat* that their ancestors were occupiers of the manor. In the second place they do not prescribe as members of a corporation, because there is no Crown grant from which the existence of a corporation can be inferred in order to uphold the grant. It is not suggested, and could not be suggested, that without a Crown grant the occupiers of land in a particular district could be constituted a corporation; therefore claiming as a member of a corporation is also out of the question. The third mode of prescribing is known as prescribing in respect of a *que estate*, that is to say, prescribing in respect of an estate which is possessed by the person claiming the benefit of the prescription. Now it is difficult to see what *que estate* there can be in a mere occupier, for if there be any *que estate* at all, it is the estate of the landlord under whom the occupier claims. But it is against those landlords that the occupiers here are claiming, and therefore, if I were to admit this prescription, I should allow the right to be claimed by a man in respect of the estate of another, and against that other; which seems to me impossible.

It appears to me to follow, from the observations I have made, that no such claim can be made by prescription; that it cannot be made by custom or by grant; and that there is no possible mode in which the custom or the right set up could be valid in law if it were proved in fact to have been followed or allowed.

*That being so, and it being admitted that the whole [693 of the plaintiffs' claim rests upon that allegation of right, I must dismiss the action with costs.

Solicitor for plaintiffs: *E. Kimber.*

Solicitors for defendants: *Cheston & Sons.*

See 17 Eng. Rep., 208 note; 21 Eng. Rep., 87 note.

The following persons have been held to be owners, within the law giving damages to persons whose lands are taken under the right of eminent domain:

A mortgagor, and that condemnation

without notice to the mortgagee was good as against the latter, and that the city was not liable to him: *Whiting v. New Haven*, 45 Conn., 303.

Same in *Massachusetts*: *Farnsworth v. Boston*, 126 Mass., 1.

But see *Farnsworth v. Boston*, 126 Mass., 9.

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To the contrary in *Michigan*: *Michigan*, etc., v. Barnes, 40 Mich., 383; *Grand Rapids*, etc., v. Alley, 34 *Michigan*, 16.

A court of equity has inherent power, where the full value of land condemned by right of eminent domain has been paid into court, to decree the money to a mortgagee who has not been made a party to the proceedings, as an equivalent for the land: *Matter of Patterson*, 27 *Pittsburgh L. J.* (10 N. S.), 73; *Platt v. Bright*, 31 N. J. Eq., 81, and

elaborate note by Mr. Stewart, the reporter, as to method of determining respective rights of various parties claiming in different rights.

Where a deduction is made from the landlord's damages, under appropriation by the sovereign, for the term the lease has to run, and awarded to the lessee, it in equity belongs to the lessor, as he is deprived of recourse to the land for his rent: *Fitzpatrick v. Pennsylvania*, etc., 10 *Phila. Rep.*, 141.

[7 Chancery Division, 693.]

FRY, J., Dec. 19, 1877.

BENTINCK V. DUKE OF PORTLAND.

[1876 B. 511.]

Will—Perpetuity—Period of ascertaining Class—Increase of Shares.

Where there is a time fixed at which a fund is to be divided into separate shares, each share stands separate, and the gift of any share will take effect if the disposition of that particular share does not violate the rule against perpetuities, and will not be made void by the invalid gift of a portion of another share to the donee of the first-mentioned share. But where there is a gift to a class and the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is void.

A testatrix made a bequest in trust for such of her four nephews and nieces as should be living at the expiration of twelve months after the death of their mother, and the issue then living who should attain the age of twenty-one years, of any of the nephews and nieces who should have died before the expiration of the twelve months:

Held, on the construction of the will, that there was no period of distribution fixed except by the gift to the class; and *held*, that as the members of the class might not be ascertained until the expiration of more than twenty-one years from the death of the mother, the whole bequest failed.

LADY MARY BENTINCK, widow, by her will, dated the 25th day of March, 1843, after giving certain specific and pecuniary legacies, gave and bequeathed unto the Duke of Portland (then Lord Titchfield), and Lord Gosford and Charles Eaton Ellis, the trustees and executors of her said will, 240 shares in the Edinburgh and Glasgow Railway Company, upon trust that the trustees or trustee for the time being of that her will should invest the dividends, interest, and income of the same shares, and the dividends, interest, and income of all such investments, so that the same might accumulate by way of compound interest in their or his own names or name in or upon some of the government or 694] *Parliamentary stocks or funds of Great Britain, or real or long leasehold securities in England or Wales, until

the death of Lady Charles Bentinck, the widow of Lord Charles Bentinck, and vary and transpose the same investments from time to time unto or for other stocks, funds, and securities of a like nature as they or he in their or his discretion might think proper, and the same accumulations to go with and follow the shares from the dividends, interest, and income whereof such accumulations might have arisen. "And immediately after the decease of the said Lady Charles Bentinck to stand possessed of the said 240 shares, and all accumulations arising therefrom, upon trust for all and every, or such one or more exclusively of the others or other, of the following nieces and nephews of my late husband, namely, Annie Hyacinthe Cavendish Bentinck, William Charles Cavendish Bentinck, Arthur Cavendish Bentinck, and Emily Cavendish Bentinck (the four children of the said Lord Charles Bentinck and Lady Charles, his wife), who shall be living at the time of the appointment next hereinafter mentioned, and the issue then living of any of the same nieces and nephews (whether the parent or ancestor of such issue shall be then living or dead), in such parts, shares, and proportions, and for such times, with such limitations over or substitutes in favor of any one or more of the same nieces and nephews and issue respectively, and either by way of legacy portion, present or remote interest, or otherwise and to vest, and be payable and paid, transferred and assigned, at such time or times, age or ages, day or days, and upon such contingency, and under and subject to such directions and regulations for maintenance, education, and advancement, and such conditions and restrictions as the person who shall then be the Duke of Portland, after the decease of the said Lady Charles Bentinck, and within twelve calendar months next after her decease in case the said Lady Charles Bentinck shall survive me, but in case she shall die in my lifetime, then within twelve calendar months next after my decease, by any deed or deeds, instrument or instruments in writing to be sealed and delivered by him in the presence of two credible witnesses, and to be attested by the same witnesses, shall direct, limit or appoint, and in default of such direction, limitation, or appointment for the space of twelve calendar months next after the *de- [695
cease of the said Lady Charles Bentinck, or my decease, as the case may be, and as to such part or parts of the said trust premises to which such direction, limitation, or appointment, if made, shall not extend, then upon trust for all and every of them the said four children of the said Lady Charles Bentinck who shall be living at the expiration of twelve

calendar months next after the decease of Lady Charles Bentinck or myself, whichever of us shall be the survivor, as tenants in common, if more than one, and also the issue then living, and who shall attain the age of twenty-one years or marry, of any of the said four children who shall have died before the expiration of such twelve calendar months, whether in my lifetime or after my decease, such issue through all the degrees to take *per stirpes* as tenants in common, if more than one, the share or respective shares which his, her, or their parent, or respective parents, would have been entitled to if living, for the absolute use or benefit of the said children or their issue respectively."

The testatrix then bequeathed the residue of her estate to her executors, upon trust as to three-sevenths thereof for three persons therein named, and as to the remaining four-sevenths upon the same trusts as were thereinbefore declared concerning the said 240 railway shares.

The testatrix died on the 1st of May, 1843, leaving Lady Charles Bentinck and her four children surviving.

The 240 railway shares and four-sevenths of the residuary estate were set apart and held by the executors, and the income had been accumulated. The shares and accumulations were still held by the Duke of Portland, the survivor of the executors.

Emily Cavendish Bentinck, one of the four legatees, married the Rev. H. Hopwood, and died in 1850, leaving issue one child; and W. C. C. Bentinck, another legatee, died in 1865, leaving issue three children.

Lady Charles Bentinck died on the 19th of March, 1875.

The Duke of Portland did not exercise the power of appointment given to him by the will.

The question was raised whether the bequests of the 240 shares and accumulations, and the devise and bequest of the four-sevenths of the residue, were not void under the rule 696] against perpetuities, *and did not lapse for the benefit of the heir and next of kin of the testatrix; and this action was brought to have the rights and interests of all parties ascertained and determined by the court.

The action now came on for trial.

Sir H. Giffard, S.G., and *Romer*, for the plaintiffs, the children of W. C. C. Bentinck and of Mrs. Hopwood: It has been contended that this bequest is void, inasmuch as one of the children of Lady Charles Bentinck might have a child born after the death of Lady Charles Bentinck, and might die within twelve months after the death of Lady Charles Bentinck; in which case the interests of all parties

would not be ascertained until more than twenty-one years after the death. But this is not so; the shares are vested in these children subject to a bad divesting clause, and the gift is therefore not invalid. Theobald on Wills⁽¹⁾, *Griffith v. Pownall*⁽²⁾, *Cattlin v. Brown*⁽³⁾, and *Knapping v. Tomlinson*⁽⁴⁾, are strongly in favor of the validity. So in *Muskett v. Eaton*⁽⁵⁾; *Festing v. Allen*⁽⁶⁾; *Stark v. Dakyns*⁽⁷⁾. In *Smith v. Smith*⁽⁸⁾ and *Hale v. Hale*⁽⁹⁾ the shares were not to be ascertained until too late; here they were to vest within the time, and were not all mixed together. There are children who can take, and the existence of others ought not to affect them. The gift is good if the period of division is fixed within the time: *Wilson v. Wilson*⁽¹⁰⁾. Here the shares of each child were separate, and each share is as well ascertained as it ever will be, though it may be afterwards subject to increase. Some of the gifts to several legatees may be good and some bad: *James v. Lord Wynford*⁽¹¹⁾.

Davey, Q.C., and *Dobbs*, for Lady Millicent Barber, representing some of the next of kin of the testatrix: The shares cannot be ascertained until the period of distribution, which is beyond the time allowed by law. It is a fallacy to say that *the shares were ascertainable at the death of the [697] tenant for life, and are merely subject to an increase. If all the children had been living, no doubt the shares would have been then ascertained, and the rule against such a gift is very hard, but it is the rule, and when any member of a class may possibly not be ascertainable within the proper time, the gift is void *in toto*: *Leak v. Robinson*⁽¹²⁾. There is a good definition of a class in *Jarman on Wills*⁽¹³⁾. The soundness of the decision in *Porter v. Fox*⁽¹⁴⁾ has been doubted. *Seaman v. Wood*⁽¹⁵⁾ and *Cattlin v. Brown*⁽³⁾ put it beyond a doubt.

V. Hawkins, for Lord Gosford, representing the heir-at-law and some of the next of kin of the testatrix: We must look at the state of things at the death of the testatrix. The gift was then to persons then living, and also to others who might be born within twelve months after the death of Lady Charles Bentinck, and who would therefore not take a share

(1) Pages 276, 298.

(2) 13 Sim., 393.

(3) 11 Hare, 372.

(4) 34 L. J. (Ch.), 8; 10 Jur. (N.S.), 626.

(5) 1 Ch. D., 435; 15 Eng. R., 840.

(6) 12 M. & W., 279.

(7) Law Rep., 10 Ch., 35; 11 Eng. R., 428.

(8) Law Rep., 5 Ch., 342.

(9) 3 Ch. D., 643.

(10) 28 L. J. (Ch.), 95; 4 Jur. (N.S.), 1076.

(11) 1 Sm. & Giff., 40.

(12) 2 Mer., 363, 382.

(13) 2d ed., vol. i, p. 216.

(14) 6 Sim., 485.

(15) 22 Beav., 591.

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until more than twenty-one years after death ; and such a gift is bad.

Joshua Williams, Q.C., North, Q.C., Kekewich, Q.C., Cracknall, Coltman, Davenport, Morris, and Cherry, for other parties :

Romer, in reply : There is an ascertained class of children and there are gifts to the children of such as shall die and leave issue, but they do not make a class. Where a gift, which is merely in substitution for another gift is void, that does not make the original gift void. At any time before the end of the twelve months, any one of the children might have come and claimed his then apparent share, which must have been paid to him though he might afterwards become entitled to more. The issue do not take directly, but only in substitution ; the substituted gift may be void and the direct gifts to the children may remain good.

FRY, J.: The question I have now to determine is with regard to the validity of certain gifts contained in the will 698] of Lady Mary *Bentinck. [His Lordship then described and read the terms of the gift.]

I will state in the first place what I conceive to be the law applicable to the question. Where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities, there, as I conceive, each share stands separate from the others, and will take effect or not according as the dispositions of that share do or do not violate the rule against perpetuities ; and I conceive it to follow that the valid gift of one share will not be made void by the invalid gift of another share, or of a portion of another share, to the donee of that first share. Further, I conceive it to be clear from the authorities that the case is quite different where the gift is what is called a class gift ; and I conceive that it is a class gift where the total and ultimate amount of the share to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they are to take, are finally ascertained.

If those be the principles of law which regulate this question, the first inquiry which arises is this : Is there or is there not here a time fixed for distribution which is within the rule against perpetuities ? It is said that there is. It is said that the time fixed is at the expiration of twelve calendar months from the death of Lady Charles Bentinck or the testatrix, whichever should be the longer liver. Now it will be observed that there is no express direction to divide at that time, and that it is only by construction or inference

that that time can be arrived at as the time for final division. I must therefore consider what are the words of gift, and of course the definition of the class will tell me when the division among the class will take place, because if there is no direction to divide except in the gift to the class the period of division must be the period of the ascertainment of the class. The class then appears to be, first, such of the four children of Lady Charles Bentinck as shall be living at the expiration of the twelve calendar months, "and also the issue then living and who shall attain the age of twenty-one years or marry of any of the said children who shall have died before the expiration of such twelve calendar months." It is said, however, that this is not *the class, and that the [699 true class consists of two categories: first, of the children of Lady Charles Bentinck then living, and, secondly, of the *stirpes* of such of the children as were then dead leaving issue living at that period.

I am of opinion that that is not the true class, and for this reason: if any one of those *stirpes* fail, it is evident that the gift among the children of that *stirps* would fail, consequently that there is not a final distribution amongst the persons or *stirpes* as has been suggested.

It is then said that although the words "who shall attain the age of twenty-one years" appear to be expressive of a condition or qualification or predicate of the persons who are to take, yet that is not the true construction, and that they ought to be held to import a proviso by way of defeasance—a divesting clause and not a qualification or predicate of the takers. That is a pure question of construction, and upon it I come to the conclusion that the attaining of the age of twenty-one or marrying at some time is a necessary condition of the issue of a deceased child taking. I hold, therefore, that the class which is to take consists of such of the four children of Lady Charles Bentinck as should happen to be alive at the expiration of twelve calendar months from her death or from the death of the testatrix, and such of the issue then living who should attain the age of twenty-one or marry, of any of the said four children who were then dead.

The inquiry then remains, if it can be called an inquiry, whether some of that class are not to be ascertained at a period beyond that which is prescribed by the rule against perpetuities. It is clear that they are, because a grandchild of Lady Charles Bentinck, being a member of the class, may attain the age of twenty-one at a period beyond the lifetime of the testatrix, or of Lady Charles Bentinck, or twenty-one

years afterwards. I am therefore bound to hold that there is no independent period of distribution here fixed, but that the period is to be ascertained from the class; that the class includes persons who may not satisfy the requirements of the rule against perpetuities, and consequently that the distribution cannot take effect, or may not take effect, within a period not obnoxious to the rule, and that the gift is void. 700] *It remains to make one or two observations on the cases. Those cases fall, I think, under two divisions. There are the cases of *Seaman v. Wood* (*), *Smith v. Smith* (*), and *Hale v. Hale* (*), which appear to me exceedingly difficult, if not impossible, to distinguish from the present case by any satisfactory explanation. I think, in effect, that I am bound by those cases to decide as I have decided. There have been cited on the other side three cases very well worthy of attention in construing this will—*Griffith v. Pownall* (*), *Catlin v. Brown* (*), and *Knapping v. Tomlinson* (*). It will be observed that in all those cases the shares taken by the persons ascertained within the period were incapable of increment by anything that might happen to the other shares. That appears to me the solid ground of distinction between those cases and the present case. In those cases, in effect, the share was finally and absolutely ascertained; it was neither capable of diminution or of enlargement after the period allowed by law. No doubt it is quite true that the distinction on which I am relying is a fine distinction—between a gift of separate shares together with an interest in other shares which interest might be void for violating the rule against perpetuities, on the one hand, and, on the other hand, of a share whose smallest amount may be ascertained within the lawful period, but whose maximum amount can only be ascertained beyond the period—nevertheless it appears to me to be a distinction which the cases compel me to draw. I hold that this case belongs to the latter and not to the former class of gifts, and therefore that the gifts to the four children of Lady Charles Bentinck entirely fail.

Declare that the bequest of the railway shares is void and that they fell into the residue. Declare that as to four-sevenths of the residue the devise and bequest are void, and that the same were undisposed of by the will.

Solicitors for plaintiffs: *Farrer, Ouwry & Co.*

Solicitors for defendants: *Walters, Young & Co.; White, Broughton & White; Hollams, Son & Coward; Baileys, Shaw & Gillett.*

(1) 22 Beav., 591.

(2) Law Rep., 5 Ch., 342.

(3) 3 Ch. D., 643; 18 Eng. R., 739.

(4) 13 Sim., 393.

(5) 11 Hare, 372.

(6) 34 L. J. (Ch.), 3; 10 Jur. (N.S.), 626.

[7 Chancery Division, 728.]

M.R., Feb. 23, 1878.

**In re CARDROSS'S SETTLEMENT.*

[728]

Infant—Power coupled with an Interest—Marriage Settlement—Infant Married Woman—Consent to Investment.

An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority.

By a settlement made with the sanction of the court, upon the marriage of a lady then, and therein described as, "an infant of seventeen years," certain funds belonging to her were vested in trustees upon trust to retain existing investments or reinvest "with the consent" of the lady and her husband during their joint lives; the lady taking the first life interest under the settlement:

Held, that the lady had power to consent to a proposed reinvestment, notwithstanding her minority.

By the settlement dated the 16th of October, 1876, and made with the sanction of the court prior, to the marriage of Lord and Lady Cardross, Lady Cardross being then a ward of court, and described in the settlement as "an infant of seventeen years and upwards," certain sums in Consols and New Three per Cent. Annuities, the property of Lady Cardross, were vested in trustees upon trust after the solemnization of the marriage to retain the existing investments or to reinvest as therein mentioned, "with the consent" of Lady Cardross and her husband during their joint lives, and after the decease of either of them with the consent of the survivor of them, and after the death of such survivor, at the discretion of the trustees; Lady Cardross taking the first life interest in the settlement funds.

A reinvestment of part of the trust funds being proposed, the question arose whether, as Lady Cardross was still a minor, she was able to give her consent thereto.

The question was raised by a petition by the trustees under 22 & 23 Vict. c. 35, for the opinion and advice of the court as to whether they would be justified in making the proposed reinvestment "with the consent in writing" of Lord and Lady Cardross.

G. Miller, for the petitioners: There appears to be no express decision on the point. It is clear that an infant may exercise a power which is not coupled *with an in- [729] terest; and in Preston on Abstracts⁽¹⁾ it is said that an infant may execute a power even though coupled with an interest "if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority;" and this passage has been

(1) 2d ed., vol. i, p. 326.

quoted without disapproval by Lord St. Leonards in *Sugden on Powers* (1), and by Vice-Chancellor Wood in *King v. Bellord* (2).

[JESSEL, M.R.: The passage is also quoted, but without comment, in *Simpson on Infants* (3).]

In *Hearle v. Greenbank* (4) Lord Hardwicke held that an infant could not execute a power over real estate, though it appears from his judgment, as interpreted by Preston, that an infant might exercise such a power if the minority is expressly dispensed with, or there is an indication of intention that the power might be exercised during minority.

In the present case, however, the property subject to the power is not real estate, but pure personalty, to which, had it not been for this settlement, Lord Cardross would have been absolutely entitled. He is therefore in reality the settlor and the author of the power; and considering that the fact of Lady Cardross being a minor is stated on the face of the settlement, it may fairly be inferred that the intention of the parties was that this power might be exercised by her at any time and notwithstanding minority.

On principle, there seems to be no reason why such a power as this should not be exercisable by an infant. An infant of fourteen can appoint a guardian; and even a feoffment by an infant was not void, but only voidable.

JESSEL, M.R., after stating the facts, continued: The real question I have to decide is, whether, Lady Cardross being still a minor, the trust for investment can at present be exercised at all.

Now when you look at the settlement itself it is manifest that in giving this power, exercisable during the joint lives 730] of Lord *and Lady Cardross, it was contemplated that it might have to be exercised during their joint lives, and possibly during the minority of Lady Cardross. Indeed, it would be most improbable that some change of investment would not be required or be found desirable before Lady Cardross attained twenty-one. Therefore, on the face of this settlement, there is evidence of contemplation on the part of the author of this power that the power might be exercised during minority. The question is whether that is sufficient.

Under the settlement Lady Cardross takes the first life interest, so that she has a power coupled with an interest; and, accordingly, it then becomes a question whether such a power can be exercised by an infant. It is singular that

(1) 8th ed., p. 911.

(2) 1 H. & M., 343, 347.

(3) Ed. of 1875, p. 40.

(4) 3 Atk., 695.

the point appears never to have been a subject of actual decision, though Mr. Preston has expressed an opinion upon it. In his work on Abstracts, after stating that an infant may execute an authority not coupled with an interest, he says this ("), "He may also execute a *power* coupled with an interest, if his infancy be dispensed with; or if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority." Then he goes on, "A power, however, given to an infant will not be considered as authorizing an exercise during his minority, except the minority be expressly dispensed with, or there be some circumstance which discloses an intention that the power may be exercised during minority." And as an authority for the latter proposition he cites *Hearle v. Greenbank* ("). I do not find that proposition so laid down by Lord Hardwicke in that case, but what Mr. Preston is probably referring to are certain passages in Lord Hardwicke's judgment, where he says ("), "Taking it therefore in general, I am of opinion an infant cannot execute such a power," that is, a power of appointment over real estate. And he says a little further on, "What had the father therefore in view? Why, to exclude the disability of coverture, and this was all he intended to guard against; and if he likewise intended to exclude the disability of infancy, he would have taken care equally to express it:" that is to say, Mr. *Preston considers [731 Lord Hardwicke to mean that if the father had expressly excluded the disability of infancy, the power would have operated. That was probably the ground of Mr. Preston's statement.

Now the first of the two passages I have quoted from Mr. Preston's book has been cited as law—at all events it has been cited without comment—by Lord St. Leonards in his work on Powers ("), and it was also referred to by Lord Hatherley, when Vice-Chancellor, in *King v. Bellord* ("), though the decision in that case was upon another point. The Vice-Chancellor says this ("), "There can be no doubt upon the authorities from the earliest times, that if a man, by his will, gives an infant a simple power of sale without an interest, the infant may exercise it." Then he says, "There is an opinion of Mr. Preston's mentioned without disapproval by Lord St. Leonards, that an infant can exercise a power even though it be coupled with an interest; but

(") Page 326.

(") 3 Atk., 695.

(") 3 Atk., 714.

(") 8th ed., p. 911.

(") 1 H. & M., 343.

(") 1 H. & M., 347.

1878 In re Radcliffe. European Assurance Society v. Radcliffe. M.R.

that is very different from selling an estate vested in the infant by a devise in fee."

Now, as I understand those observations of the Vice-Chancellor, he does not disapprove of that opinion of Mr. Preston's, and it certainly seems to me to be consonant with good sense; and considering that the point now comes before me for actual decision for the first time, I will state that in my opinion it is good law that an infant can exercise a power even though it be coupled with an interest, where an intention appears that it should be exercisable during minority.

The inquiry will therefore be answered in the affirmative.

Solicitors: *Lanfear & Stewart.*

An infant may execute a mere power of appointment: *Sheldon v. Newton*, 8 Ohio St. Rep., 494; *Thompson v. Lyon*, 20 Mo., 155; *Zouch v. Parsons*, 3 Burr., 1794, 1802; *Hearle v. Greenbank*, 8 Atk., 710.

Otherwise if coupled with an interest: *Snyder v. Staihr*, 20 Mo., 269; *Hearle v. Greenbank*, 8 Atk., 695.

An infant who purchases land for another, takes a deed in his own name, and then immediately conveys to the proper person, cannot repudiate the deed; for an infant may execute a power as absolutely and irrevocably as an adult: *Sheldon v. Newton*, 8 Ohio St. R., 494.

At common law an infant could act as executor at the age of seventeen, and if an infant under seventeen were appointed executor, administration du-

rante might be committed to the mother or other friend of the infant, which would cease and become void when the infant arrived at the age of seventeen: *Piggott's Case*, 5 Coke's Rep., 29; *Prince's Case*, 5 Coke's Rep., 30.

And so where the law requires an executor to be 21 years of age, if an infant be named as executor, administration *durante minore aetate* may be granted: *Bouvier's Law Dict.*, tit. Administration; 2 Bl. Com., 508.

Though in some of the states, by statute, in such case administration *cum testamento annexo*: N. Y., 2 R. S., 69, § 3, 2 Edm. St., 71, as amended in 1873, ch. 79, p. 159; 2 R. S., 75, § 32, 2 Edm. St., 77; *Cluett v. Matlice*, 43 Barb., 417; *Cottle v. Vanderheyden*, 39 How. Pr., 289, 56 Barb., 622, affirmed 11 Abb. Prac. Rep. (N.S.), 17.

[7 Chancery Division, 783.]

M.R., March 4, 1878.

733]

**In re RADCLIFFE, Deceased.*

EUROPEAN ASSURANCE SOCIETY V. RADCLIFFE.

[1877 R. 7.]

Creditor's Action—Executor paying one Creditor in full after Writ—Conflicting Rules of Law and Equity—Judicature Act, 1873, s. 25, subs. 11.

Where an executor or administrator, after the commencement of a creditor's administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under Judicature Act, 1873, s. 25, subs. 11, and he will accordingly be held to have made a good payment, and will be allowed in passing his accounts, even though he may have had notice of the action before payment.

To prevent such payments being made in any such action, the plaintiff should, immediately upon issuing the writ, apply for and obtain a receiver.

THIS was an administration action by the European Assurance Society on behalf of itself and of all other creditors of a testator who died insolvent in July, 1876.

The writ was issued in January, 1877.

The defendant, the testator's widow and executrix, after having had notice of the action and undertaken by her solicitor to appear thereto, voluntarily paid two of the creditors in full.

The action now came on for trial.

Chitty, Q.C., and *Romer*, for the plaintiff: The only question is whether, in taking the accounts of the defendant as executrix, she ought to be allowed these payments as against the unsatisfied creditors.

The rule at law undoubtedly is that, after the commencement of a creditor's action against an executor, a voluntary payment by *the executor to one creditor, after notice [734 of the action, will not be allowed: *Williams on Executors* (*).

In the equity case of *Darston v. Lord Orford* (*), Lord Keeper Wright followed that rule, holding that a bill in equity was equivalent to an action at law; but his decision was afterwards reversed by the House of Lords (*). The common law rule was also followed in *Parker v. Dee* (*). In *Maltby v. Russell* (*) Sir John Leach followed the decision of the House of Lords in the former case, and held that an executor or administrator might, after the institution of a creditor's suit and before decree, pay any particular creditor in preference, and would be allowed such payment in passing his accounts.

Ince, Q.C., and *Bardswell*, for the defendant: If there is any conflict between the rules of law and equity with reference to any particular matter, the rules of equity are now to prevail: *Judicature Act, 1873, s. 25, subs. 11.*

JESSEL, M.R.: There will be the usual judgment for administration. With regard to the particular question now raised, the equity rule established by the House of Lords in *Darston v. Lord Orford* must now prevail both at law and in equity, and therefore if an executor or administrator, after the commencement of a creditor's action and before judgment, voluntarily pays any creditor in full, he will be considered as having made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment. The defendant will therefore be allowed these two payments.

(¹) 7th ed., pp. 1033, 1037.

(²) *Prec. Ch.*, 188.

(³) *Colles*, 229.

(⁴) 2 Ch. Ca., 200; 3 Sw., 529 n.

(⁵) 2 S. & S., 227.

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Chilton v. Corporation of London.

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The only way to prevent such payments being made is by the plaintiff, upon issuing the writ, immediately applying for and obtaining a receiver.

Solicitors: *Mercer & Mercer*; *J. H. Lydall*, agent for *T. & T. Martin*, Liverpool.

[7 Chancery Division, 735.]

M.R., March 4, 1878.

735] *CHILTON V. CORPORATION OF LONDON.

[1878 C. 16.]

Commoner—Profit a prendre—Right of Lopwood—Grant to Inhabitants of a Parish—Corporation—Action by one Inhabitant—"Inhabitant"—Right claimed by Occupier of House illegally erected—Presuming Act of Parliament—Motion on Defendant's Admissions—Admission of non-existent Right—Rules of Court, 1875, Order XL, r. 11.

A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by Crown grant or act of Parliament.

A grant by the Crown of a *profit a prendre* out of Crown lands to the inhabitants of a parish, constitutes the inhabitants a corporation *quoad* the grant, and an action to establish any such right is maintainable only by the inhabitants as a corporation, and not by an individual inhabitant suing on his own behalf alone:

Semble, a grant to the "inhabitants" of a parish lying within a manor of a *profit a prendre* out of the manorial waste, means a grant to the inhabitants of houses lawfully erected within the parish, and does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed.

The court will not presume a non-existent act of Parliament as an origin for an alleged right.

Willingale v. Mailland (1) explained.

(1) Law Rep., 3 Eq., 103.

[7 Chancery Division, 745.]

M.R., Dec. 1, 1877.

745] *ATTORNEY-GENERAL V. DUKE OF NORTHUMBERLAND.

[1875 A. 35.]

Charity—Founder's Gift to "Poor Kindred"—Meaning of "Poor" or "Poorest"—Least Wealthy of a Wealthy Class excluded—Charity Scheme—Cy-près.

To constitute a gift to the "poor" or "poorest" of a specified class of persons a charitable gift, it must be construed as a gift to the actually poor, and not to the least wealthy of a wealthy class.

Dictum of Wickens, V.C., in *Gillam v. Taylor* (1) disapproved of.

Isaac v. Defriez (2) explained.

A testator, who died in 1628, gave, "for the use and benefit of the poorest of his kindred, such as were not able to work for their living, viz., sick, aged, and impotent

(1) Law Rep., 16 Eq., 581; 7 Eng. R., 595.

(2) Amb., 595.

persons, and such as could not maintain their own charge," *the sum of [746 £1,000, to be laid out in the purchase of lands of the value of £60 a year at least, the rents and profits thereof to be distributed yearly among them by trustees; and the testator declared his meaning to be that in distributing his estate and goods "to the poor charitable uses," those of his kindred which were poor, aged, impotent, or any other way unable to help themselves should be chiefly preferred.

After the testator's death the £1,000 legacy was laid out by his trustees in the purchase of a freehold estate, which they let on building leases under powers contained in an act passed in 1772.

In 1876, in consequence of the rapidly increasing income of the estate and the large number of the testator's kindred, of whom some only could be considered proper objects of charity, a scheme was proposed for the future regulation of the charity created by the will, whereupon the question arose whether any and what portion of the income of the charity property could or ought to be appropriated to the benefit of any persons not being kindred of the founder:

Held, that the testator's gift must be read as a gift to charitable objects, such objects being persons necessitous and disabled according to the definition in his will, but with a prior charge in favor of such of his kindred as should be necessitous and disabled; and therefore that, subject to this prior charge, the income of the estate was applicable for the benefit of charitable objects other than kindred of the testator.

ADJOURNED SUMMONS. The action was instituted in March, 1875, with the object of having a scheme settled by the court for the regulation of a charity, commonly known as "Smith's (Poor Kin) Charity," created by the will, made in 1627, of Henry Smith, a citizen and alderman of London, who died in 1628.

The charity originated in two bequests in the will, of which one was as follows:—

"I give and devise for the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge, the sum of £1,000; which said sum of £1,000 my will and meaning is shall be laid forth and bestowed in the purchase of lands of inheritance of the value of threescore pounds per annum at the least, and the rents and profits thereof to be paid yearly unto them, and to be distributed amongst them by my said executors and their heirs, and by the Lord Mayor of London and the sheriffs for the time being, as most need shall be from time to time: And my will and meaning is, that in the bestowing and distributing of my estate and goods to the poor charitable uses, *which is, according to my in- [747 tent and desire, those of my kindred which are poor, aged, impotent, or any other way unable to help themselves, shall be chiefly preferred and respected."

At the foot of the will there was a memorandum that "the testator being asked which of his kindred he meant and intended in and by those words, the poorest of his kindred, &c., in the legacy of £1,000 bequeathed in his will to

be laid out and bestowed in the purchase of lands of inheritance of the value of £60 per annum, and the rents and profits to be paid yearly unto them, &c., made answer that his meaning was thereby the poorest of his sisters' children, and their children successively, or like in effect."

Shortly after the testator's death his legacy of £1,000 was, together with the other charitable legacy, laid out in the purchase of a freehold estate called "The Kensington Estate," situate in the parishes of Kensington, Chelsea, and St. Martin-in-the-Fields, in the county of Middlesex, which estate had since continued to be and was now vested in and under the management of the trustees of the charity.

Under the powers of an act passed for the purpose in 1772, the trustees from time to time granted building leases of various portions of the charity estate.

This action had become necessary on account of the rapidly increasing income of the Charity, and the large number of persons, about 700, claiming to be the testator's "kindred," only some of whom were possessed of the qualifications prescribed by the will, of being sick, aged, and impotent persons, and such as were not able to work for their living.

In July, 1875, a decree was made in the action directing that a scheme for the future regulation and management of the Charity should be settled by the judge; and also that an inquiry should be made into the particulars of the property of the Charity.

On a draft scheme being carried into chambers by the Attorney-General, a question arose, among others, whether any and what portion of the income of that part of the estate representing the £1,000 legacy above mentioned ought to be appropriated to the benefit of any persons not being kindred of the founder.

The question was raised by a summons taken out by the 748] *Attorney-General to proceed with the settlement of a scheme and with the inquiry directed by the decree.

Davey, Q.C., and *Vaughan Hawkins*, for the Attorney-General: The gift may, we submit, be read either as a gift to the testator's poor kindred, or as a gift to poor persons generally with a preference in favor of the kindred. It is immaterial which construction is adopted: poverty was clearly the leading idea in the testator's mind. In the one case, by the application of the *cy-près* doctrine, the surplus income, after providing for the kindred answering the testator's description as persons unable to work for their living, &c., should go to poor persons generally who answer the

testator's description but are not of his kindred; and in the other case disabled and necessitous poor persons in general will participate under the will, independently of the *cy-près* doctrine.

Our view is that the primary objects of the testator's bounty are his poor kindred, and that if the income is more than sufficient for the relief of poor kindred, the surplus should go, preferably, to "poor" rather than to "kindred." Poverty being the main object the testator had in view, the proper application of the surplus, after providing for kindred who are actually poor, is to the relief of poverty outside the kin, rather than for the benefit of kin who, though poor by comparison with other members of the class, may nevertheless really be in affluent circumstances, and not proper objects of charity.

Bagshawe, Q.C., and *W. Barber*, for the defendants, the trustees of the Charity: We submit that the Charity should not necessarily be limited to paupers, but might be very properly extended to the education or advancement of the children of poor persons, treating the testator's poor kindred as primary objects.

Chitty, Q.C., and *Macnaghten*, for the "Committee of Kindred," who had obtained leave to attend: We submit that, upon the construction of the will, the income is distributable at the discretion of the trustees among the poorest of the testator's kindred; not necessarily poor in the abstract sense, but among such of the kindred as the [749] trustees may consider to be the poorest. Supposing some of the kindred had £20,000 a year, and every one of the others £10,000 a year, it seems that would not prevent this being a charitable gift in favor of the latter, they being literally the "poorest." This was so laid down by Vice-Chancellor Wickens in *Gillam v. Taylor* (¹), on, as he considered, the authority of *Isaac v. Defriez* (²).

[JESSEL, M.R.: A gift which is not a gift to the poor, that is, the actually poor, is not a charity. How, for instance, could a gift to the "poorest of the Dukes of Northumberland" be a charity? I am surprised at Vice-Chancellor Wickens' *dictum*, and I cannot follow it. He seems to have overlooked the actual decision in *Isaac v. Defriez*.]

At all events, if your Lordship should read this as a gift for poor persons, taking "poor" to mean necessitous or destitute, there seems to be no good reason why the views of the trustees should not be adopted, and the benefits of the Charity extended to the education or advancement of the

(¹) Law Rep., 16 Eq., 581; 7 Eng. R., 595.

(²) Amb., 595.

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children of such poor persons, preference being given to the testator's kindred.

Vaughan Hawkins, in reply.

JESSEL, M.R. : I think if it had not been for the mistake which a very learned Vice-Chancellor—whom we all regret—appears to have made, this case would never have come into court. The gift in the will is “for the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge.”

Now “poorest” evidently means “very poor.” I do not mean to say the word “poorest” is accurately used, but that is the meaning of it. When the testator talks of “sick, aged, and impotent persons,” he means sick, aged, and impotent, so as to incapacitate them from earning their living. That is what he means. He does not mean a man with £10,000 a year who happens to be sick, or aged, or impotent. The object he intends to benefit is to be a proper object of charity.

750] *Upon that there really is authority; and the singular part of the matter is, that the authority which I am now going to quote was unfortunately—I cannot say misunderstood, because I cannot believe that the late Vice-Chancellor Wickens misunderstood it—but probably overlooked by him: I think by some accident he must have trusted to memory instead of looking at the authority. The old case of *Isaac v. Defriez*(¹) was this: Nathan Simpson, by his will, after his sister's death, gave property to his own and his then present wife's “poorest relations,” to be distributed and paid to them proportionally, share and share alike, at the discretion of his executors. The bill was filed by the executors or trustees against the Attorney-General and some of the poor relations. It was decided to be a charity—but a charity for whom? The decree, as stated in the note to the report, was this: it declared that the charity ought to be established, and directed accounts; and any of the parties were to be at liberty to lay a scheme before the Master for carrying the charity into execution; “an inquiry was also directed whether the defendants, or either of them, were poor relations of the testator; and any other poor relations of testator or his wife were to be at liberty to go before the Master to claim such benefit as they may be entitled to under the will.”

That is, the court read the word “poorest” to mean “poor” or “very poor.” The court did not mean poorest

(¹) Amb., 595.

in the sense of being least wealthy of a number of wealthy people. In that sense, no doubt, the man who had £10,000 a year would be the poorest of a dozen persons each of whom had more than £10,000 a year; but what the court meant was actually poor, treating the word "poorest" as a word of intensity, meaning at least "very poor."

In the *Attorney-General v. Price* (¹), before Sir William Grant, then Master of the Rolls, the word was "poor." The gift was to a man and his heirs, to "divide and distribute according to his and their discretion amongst my poor kinsmen and kinswomen;" and the Master of the Rolls said, "This appears to me to be in the nature of a charitable bequest, particularly upon the case of *Issac v. Defriez*, which is both imperfectly and erroneously reported:" and then in a note to that case there is a correct account given of the decree in *Isaac v. Defriez*, in substantially the same terms as *the account given in the note to Ambler's [751 report, which I read just now.

The inquiry in this case of the *Attorney-General v. Price* (¹) was, "whether the plaintiffs are poor relations of the testator; and whether there are any others of his poor relations who dwell within the county of Brecon." What the Master of the Rolls went on to say regarding *Isaac v. Defriez* (²) was this: "This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance in favor of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations."

In *Gillam v. Taylor* (³), the case to which I first referred, the question was one of construction. The will there directed interest from time to time to be given to such of the lineal descendants of a man as they might severally need. That was construed by the Vice-Chancellor to mean such of them as should be needy. That is a question of construction. But I must read the gift as a gift "to such needy lineal descendants of R. W. from time to time as they might require;" and the trustees were to make provision for ensuring the continuance of the trust at their decease.

The real point decided was, that that was a charitable gift, and that the gift was not to go to those who were relatives at the death; that is, that there was not to be an immediate distribution among persons beneficially, but a

(¹) 17 Ves., 371, 378.

(²) 17 Ves., 371.

(³) Amb., 595.

(⁴) Law Rep., 16 Eq., 581; 7 Eng. R., 595.

distribution among charitable objects, the words "in need" being read to mean "needy."

Then the Vice-Chancellor Wickens says this⁽¹⁾: "I have, though unwillingly, come to the conclusion that I am bound by the cases of the *Attorney-General v. Price* and *Isaac v. Defriez*, and that I must treat this as a charitable gift;" that is, reading "in need" to mean "needy," the case fell exactly within those decisions. Then he refers to what Sir William Grant says in *Attorney-General v. Price*; and then he goes on to say this: "No doubt the word 'poor' occurred in that case. The language is: 'It is amongst my poor kinsmen and kinswomen, and amongst their offspring and issue.' And in the case of *Isaac v. Defriez* the testator's bequest was unto his own and his wife's poorest relations, 752] at the discretion of the *executors; not abstractedly poor, but to be divided equally amongst such persons as the executors considered to be the poorest relations. Every one of them might have £10,000 a year, but some might have £20,000 a year, and those who had £10,000 a year would take it. Still it was held to be a charity."

Now, that is an entire mistake of the Vice-Chancellor's. The decree in *Isaac v. Defriez*⁽²⁾ was only for poor relations, and the decree would not have comprised a person who had £10,000 a year, nor did anybody ever decide that such a gift as that would be charitable, for the moment you hold that a person who has £10,000 a year can take under such a gift, you would hold at the same time it was not a charity. No one can take under a charitable gift unless it is within the statute of Elizabeth as interpreted by the courts. I need not say that the words of the statute have received a very liberal interpretation, but no court has ever held that a man who had £10,000 a year was an object of charity within the purview of that statute.

How the Vice-Chancellor came to make such a singular mistake, supposing he is correctly reported, I cannot tell; because there was nobody on the bench or off it who was more familiar with charity cases than he was.

I am bound to make these observations, because *Gillam v. Taylor*⁽³⁾ is reported, and has been cited to me as an authority. It is no authority at all, so far as that *dictum* is concerned, and is totally opposed to the whole theory of charity administration in this court.

That being so, I will now proceed to consider what is the testator's will, and what ought to be done with the surplus,

⁽¹⁾ Law Rep., 16 Eq., 584; 7 Eng. R., 597.

⁽²⁾ Law Rep., 16 Eq., 581; 7 Eng. R.,

⁽³⁾ Amb., 595.

595.

if, any, of the income of this estate, after providing for what I consider to be the true objects of the charity.

The will is plain enough to my mind. [His Lordship then read the bequest above stated, and continued:]

It seems to me that what the testator means is that all his poor kindred who are unable to get a living, unable to work for their living because they are sick, aged, or impotent persons, or cannot otherwise maintain themselves, are to be provided for. That is the first charge.

*But, subject to that, I think the testator does [753 show, under the word "preferred," an intention—reading the words "to the poor charitable uses" to mean "to charitable uses for the poor"—that the whole of the property should be devoted to charitable uses for the poor, subject to the direction as to preference which I have mentioned. That, I think, is the meaning of the will.

It appears to me, therefore, that the first trust of the income of that portion of the estate representing the original £1,000 legacy is for the poor kindred of the testator—poor according to the definition in the will, and no other; that is, people who are not able to work for their living, or by reason of their being sick, aged, or impotent, or, for any other reason, unable to keep themselves. That is the meaning of "help themselves." That is the class of persons to be provided for, and if there is more than sufficient to provide for them, the surplus must go to objects of charity to be pointed out by the court.

The result, therefore, is that there will be a declaration that the income of this portion of the estate is applicable, primarily, and so far as required for the purpose, for the relief of poor persons, being kindred of the testator, who, from age, sickness, infirmity, or otherwise, are incapable of maintaining themselves; and that, subject to this, such income is applicable for the benefit of charitable objects other than kindred of the testator. The costs will be costs in the action.

C.A. Feb. 11, 1878. The Committee of Kindred appealed only upon a point connected with the other charitable bequest, which does not call for a report.

Solicitors: *Clabon; Bray & Co.; Grover & Humphreys.*

[7 Chancery Division, 754.]

V.C.M., Feb. 14, 1878.

754]

**In re* HODGES.

DAVEY v. WARD.

[1875 H. 50a.]

Maintenance and Education—Discretion of Trustees—Control of the Court—Past and Future Maintenance.

A testator gave a legacy of £3,000 to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one:

Held, that the court had power to control the discretion of the trustees in the allowance to be made for children; and the court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance.

THIS was a motion to vary an order made in chambers directing that the dividends accruing due during the minority of the infant plaintiffs, Catherine, Teresa, and Mary Davey, on £3,612 5s. 6d. £3 per Cent. Annuities now in court to the credit of this action be from time to time paid to Edward Charles Davey for the future maintenance and education of the infant plaintiffs; and that in lieu thereof a direction might be inserted in the order to the effect that such dividends were to be accumulated for the benefit of the infant plaintiffs until the youngest or youngest survivor of them attained the age of twenty-one years, as directed by the will of the testator, Richard Hodges; and that the costs might be paid by the said Edward Charles Davey.

Richard Hodges, by his will, dated the 17th of December, 1870, appointed Richard Ward, J. Edward Reeve, and Sydney Hodges executors of his will. The testator devised and bequeathed the residue of his real and personal estate to his trustees upon trust to convert the same into money; and as to the sum of £3,000, he directed them to stand possessed thereof, and of the stocks, funds, and securities upon which the same should from time to time be invested, and the accumulations thereof, until the youngest *or youngest survivor of the three daughters of Sarah Davey, deceased, the late wife of Edward Charles Davey, namely, Catherine Mary Davey, Teresa Mary Davey, and Mary Ellen Davey, should attain the age of twenty-one years; and immediately after the youngest or the youngest survivor of such daughters should attain that age, then upon trust to pay, transfer, and

divide the same sum of £3,000, or the stocks, funds, or securities upon which the same should for the time being be invested, and all accumulations thereof, unto or among the said three daughters of the said Sarah Davey, or the survivors or survivor of them, share and share alike, or solely, as the case might be; and in case all the said three daughters should depart this life before the youngest of them, or the youngest survivor of them, should attain the age of twenty-one years, then upon trust to transfer and divide the said sum and all accumulations thereof between Richard Ward and Mary Ann Reeve equally, share and share alike, absolutely and beneficially. And the will contained the following clause:—

“And I direct that if any person or persons for the time being actually or presumptively entitled to all or any part or share of and in the several legacies, sum and sums of money, moiety or moieties, and trust moneys hereinbefore respectively directed to be invested as aforesaid, or any or either of them, or the dividends, interest, or proceeds therefrom respectively arising, or the accumulations thereof, either under or by virtue of the trusts hereinbefore contained, or of any direction, appointment, gift, or bequest made under or in exercise of the said trusts, or any or either of them, shall (after the decease of the person or persons respectively entitled to the life interest in the said legacies, sum or sums of money, moiety or moieties, or trust moneys, or any part or share thereof, if there be any such person or persons), if a male, be under the age of twenty-one years, and if a female, be under that age and unmarried, my said trustees or trustee for the time being shall pay and apply the whole, or such part as they or he the said trustees or trustee for the time being shall think fit of the annual produce and income of the legacy, sum of money, moiety or moieties, dividends, interest, or proceeds, or accumulations, or part or share to which such person shall for the time being be actually or presumptively entitled for or towards his or her maintenance, *education, and advancement in the [756 world, until such person, being a male, shall attain the age of twenty-one years, or being a female, shall attain that age or be married, and shall, during such minority or minority and discoveriture, as the case may be, accumulate all the surplus, if any, of the said annual produce and income in the way of compound interest by investing the same and all the resulting produce and income thereof from time to time in and upon any of the stocks, funds, securities, or investments hereinbefore authorized, and add such accumulations to the

principal or capital of the fund or share from which the same shall have arisen, with power nevertheless for my said trustees or trustee for the time being to resort to any such accumulations for the maintenance, education, or advancement in the world of the person or persons for the time being presumptively or actually entitled thereto."

The testator died in 1873, and the £3,000 legacy was paid into court by the trustees, and invested in £3,612 5s. 6d. £3 per Cent. Annuities.

There was also a summons by Edward Charles Davey, the father of the three infant children, so that out of the sum of £3,612 5s. 6d. standing to the credit of the cause, and £503 12s., the amount of dividends accrued, a sum of £463 might be allowed him for the past maintenance of his children from the 25th of July, 1873, to the 25th of January, 1878, less the sum of £90 advanced by the trustees for the maintenance of the infants.

Edward Charles Davey, by his affidavit in support of the application, stated that the trustees had allowed him a sum of £60 a year for the first year and a half after the investment of the legacy of £3,000 to the infant children, but after the institution of this action the trustees had refused to continue that allowance. He further stated that he had continued to maintain and educate the three children at the Ursuline Convent at a cost of £150 per annum, to defray which he had borrowed from his sister, lately deceased, the sum of £350, which her husband was now pressing him to repay, and he had had a gift of £50 from his mother, and he had mortgaged for £63 his life policy in an assurance company. His income did not exceed £200 per annum, and he had five other children by his second marriage, and was quite 757] unable to maintain *and educate his three daughters, the plaintiffs in this suit, from his own resources; he therefore submitted that the whole of their income should be allowed him for the purpose.

Bristowe, Q.C., and *Stallard*, for the trustees: By the will of the testator the trustees have the entire discretion of allowing what sum they think necessary for the maintenance and education of the three children. The court has no power to override this discretion if it is fairly and properly exercised. This principle was laid down in *Costabadie v. Costabadie* (1), where the court held that if a discretionary power is vested in trustees, that discretion will not be interfered with, if it be fairly and honestly exercised. No doubt the court has a right to inquire into the circumstances to

(1) 6 Hare, 410.

ascertain whether the trustees are acting fairly and honestly, but there is no evidence in this case to show that the trustees are not exercising their discretion to the best of their ability. The evident intention of the testator by this will was to have the dividends accumulated, for which he has given minute directions, and his object clearly was to augment the fund, so that when the children attained the age of twenty-one they might have a handsome amount which would be of real use to them.

The clause for maintenance and education is added in a later part of the will, and is applicable to all the various legacies given by the testator, but it is not because the trustees have that power that they should be bound to exercise it when they fairly and honestly consider that it will be more for the advantage of the children to have an accumulated fund for their future advancement in the world. Moreover in this case the three children are not the only persons interested in the fund, which is given over in case they die under twenty-one, and it was held by the Master of the Rolls in *Fairman v. Green* (1), that maintenance for children would not be allowed out of legacies given over in case of their deaths under twenty-one, without the consent of the legatee over.

J. Pearson, Q.C., and Freeling, for the father, Edward Charles Davey: When a discretion is given to trustees to allow maintenance *and education, the court has [758 power to interfere and control that discretion. It is for the court to decide whether the trustees are exercising their power discreetly or not. The court will no doubt pay every attention to the suggestion of the trustees, but the interests of the children who are wards of the court must be the first object of consideration. The only cases in which the trustees will not be interfered with is where they are given an uncontrollable discretion, or where there is a certain sum fixed for maintenance which is not to be exceeded. The father of these children is a man of small income, which he states to be under £200 per annum, and there is no evidence to disprove it. He cannot, therefore, provide adequately for all his family, and it is far better that these three children should have a good education provided for them out of their own income, than that they should grow up without proper education, though they may have a small increase of income at a future period.

Then as to the second application, which is in the shape of an adjourned summons by the father to be allowed past

(1) 10 Ves., 45.

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maintenance, this follows as a matter of course if the court should be of opinion that the whole of the income or any larger part of it than he has hitherto received, should be paid to him. For a year and a half the trustees allowed Mr. Davey the sum of £60 per annum, but after his application for an increased allowance he has received nothing, still he has gone on with the education of the children, and has been obliged to borrow money for the purpose. All we now ask is that the sum which he has borrowed, and which he is unable to repay, may be allowed him.

[They referred to Simpson on Infants⁽¹⁾.]

Bristowe, in reply: It is too late now for Mr. Davey to apply for past maintenance. The application should have been made in chambers when future maintenance was allowed. Under any circumstances he ought not to have the whole income of the children.

MALINS, V.C.: These are two applications, not relating 759] to any very large sums *of money, but applications involving principles of this court of the highest importance. If I were to accede to the application of Mr. Bristowe I should be acting on principles which would paralyze the discretion of myself and the other judges of this court to an extent which, in my opinion, would be most prejudicial to the best interests of society.

I have before me this case: Under the will of Mr. R. Hodges, who died in 1869, there was a legacy of £3,000 left to three children; and for the administration of the estate of which they are legatees, a bill has been filed, and they are now regularly wards of the court. There was no preceding life estate, for the mother was dead when the will was made, but the legacy of £3,000 was given to them, or the survivors or survivor of them, who should attain the age of twenty-one years, and if they all three died under the age of twenty-one years, there is a gift over, and under that gift over one of the trustees is interested. When the matter was before me in chambers, I asked the trustees, or at least the representative of the trustees, whether it was on account of the personal interest of one of them that he objected to the order I proposed to make for the maintenance of these children, for I said, If your personal interest is concerned I will indemnify you against any loss by effecting a small insurance—and a very small sum will pay for it, because the children are now of the respective ages of eighteen, seventeen, and fourteen years, and the gift over cannot take effect if any one of those three children attain the age of twenty-one.

(¹) Page 287.

Not only are they the absolute legatees of the £3,000, so that nobody can possibly have an interest in it except they all three die under the age of twenty-one, but there is also in the will an express direction to the trustees or trustee for the time being to pay and apply the whole or such parts as they or he shall think fit of the annual produce and income of the legacy for their maintenance and education; so that the trustees have the most complete power of maintenance to the extent of the whole or any part of the fund.

Now, these children being my wards, some short time ago—not for the first, but for the second time—the matter was brought before me on further consideration, and an application was made that I should allow to the father the whole of the income for the *maintenance and education of [760] the children. I then applied the rules which are always acted upon by myself and I believe by every judge of this court. The only thing I have to look to is the interest of the wards, and what is best for them. First of all, I considered it desirable that they should live with their father. He is a wine merchant, in a small way of business, with a very limited income. He has married again—there were three children by his first marriage—and by his second marriage he already has five children. I have evidence before me that his income does not exceed £200 a year. Considering, therefore, that he had to support five children, who had nothing but his labor and his business to depend upon, and considering that these three children have an income of their own of more than £100 a year, I found that the trustees, in the exercise of their discretion, thought fit to limit the allowance to £60 a year, and what I had to determine was, whether it was more for the benefit of these infants that £40 a year should be accumulated until they had attained twenty-one, which would not amount to above £150 or £200, or whether it was better that the father, who is incapable out of his own resources of educating them, should have this additional £40 a year for that purpose. The trustees certainly, in chambers exhibited great obstinacy about it; they were not there personally, and I do them the credit of believing that if they had been there and heard my views, I should have had no further difficulty; but the managing clerk of the agents of a firm at Wolverhampton, acting upon written instructions, was a very strenuous opponent to the exercise of my discretion to the extent of the extra £40 a year. I am now still more surprised than I was at chambers, because I find Mr. Pearson in possession of a letter, in which the trustees, taking a very reasonable view at that time, say

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"the children are wards of court, bring it before the Vice-Chancellor, and if the Vice-Chancellor thinks fit to allow the whole we are satisfied." Why they altered that view, unless they or the solicitor had some personal quarrel with the father, I cannot tell; but, to my mind, it is incomprehensible that any trustee should have thought it worth while to offer such an opposition, and still more incomprehensible that when the court in chambers, as it does in all these matters, has carefully considered it, as I most undoubtedly did, 761] and gave my *reasons, he should have thought it worth while to instruct counsel to bring such a case as this before the court.

Now, on what principle is it argued that I cannot do this? It is said that the trustees have the discretion, and therefore that the court has none. I beg to say I act upon the principle, and until I am overruled I shall continue to act on the principle, that I have a controlling power over all trustees. For instance, if trustees should consent to a marriage of one of my wards, and I thought it an improper marriage, I should control their discretion by refusing the marriage. If they objected to a marriage, and I thought the objection unsustainable, I should overrule the objection and allow it, if I thought the marriage a desirable one, as the Vice-Chancellor Stuart did in a very remarkable case of a young lady who lived near Brighton, who had a very large fortune; the Vice-Chancellor Stuart refused to allow the marriage; the Court of Appeal did afterwards allow the marriage, but it went on the principle that this court will not be fettered by the exercise of the discretion of the trustees, but will control that discretion if it thinks fit. I quite agree with what Mr. Pearson has stated, that if the amount of maintenance is limited, and it is provided that such maintenance shall not exceed a certain amount, then the court can do nothing, and that is the principle I acted upon in Lord Nigel Kennedy's case, and if, as Mr. Pearson submitted, the discretion of the trustees is to be absolute and uncontrollable, the court will not interfere; but where the will says that the whole or any part shall be applied according to the discretion of the trustees, the court may allow more if it thinks fit. If the discretion of the trustees is, in the opinion of the court, improperly exercised, the court will control that improper exercise.

In order to show that that view is wrong, Mr. Bristowe refers me to the case of *Costabadie v. Costabadie*, where Sir J. Wigram says⁽¹⁾: "If the gift be subject to the dis-

(1) 6 Hare, 414.

cretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power, where a proper and honest discretion is exercised." He says it must be either improper or dishonest, and if it is so, then the court will *interfere. Then he says further on: "If the relief [762 were not given in that manner, there might at each moment be a new case arising, and with it a new suit. I am not aware, however, that the court has ever denied the right of a testator to give a discretion, or deprived the trustee of it as a matter of course." Therefore the view I have always acted upon, which, I think, is the proper view, and which I shall continue to act upon, is this, that where the trustee acts in the exercise of his discretion, it is incumbent upon the court to pay every respect to that exercise, but it must consider whether it is properly done; adopting the language of Sir J. Wigram, which Mr. Bristowe cites to me, the court must consider whether it is an honest and proper discretion. Paying every respect, as I always do, and as I am bound to do, to the discretion of the trustees, I still must exercise my own judgment, and take that course for my wards which I think is most for their benefit.

Acting upon that principle, I do not think the exercise of the discretion before me proper. I do not think it to the interests of the wards that they should be left uneducated, or that the father should incur debt for the purpose of their education when they have the means of maintaining themselves, and therefore, in the proper exercise of my discretion, which I am perfectly satisfied now, as I was then, I discreetly exercised, I did order, not according to the dictates of the trustees who attempted to dictate to me £60 a year, but the whole income of £100 a year for the maintenance of these infants. That part of my order will stand, and I therefore refuse the application of the trustees.

I did warn them that if they brought this question to be argued in court I should probably make them pay the costs, but as Mr. Pearson does not ask for costs, I will, to that extent, moderate what I said. The trustees will have the costs out of the estate or out of the accumulated fund. This disposes of the first part of the application.

The next thing is a summons taken out in chambers for the allowance of past maintenance. The great objection made by Mr. Bristowe to that is, that when the application was made to me in chambers for future maintenance no application was made for past maintenance; that is certainly

763] true, though I believe, *from all I hear, it arose from a misunderstanding. It was not expressly asked from me personally, and it seems to have been supposed by the other side that I ordered the past maintenance. When the order went before the Chief Clerk, he, considering that I had not made an order for the past maintenance, struck out that part of the order which gives past maintenance. Therefore the thing was not done; but I am not aware in these matters, where the well-being of the wards is the only thing to be considered, that it is at any time too late to make the application which has been made before me for their benefit.

Applying the same principles, I have before me evidence that this gentleman is without the means of educating these children. He is a respectable man. I should never allow any maintenance for a child to a father unless I was satisfied that he was going to spend it properly, but being satisfied in this case that he is a respectable and well-conducted man I make the order that he shall have this maintenance. It is now stated that for the purpose of educating his children for the time past he has sent them to the Ursuline Convent, they being Roman Catholics, and that he has borrowed money and has got into debt, and that he has not the means of paying the debt. Therefore I have this choice, whether it will be more for the well-being of these children that I should save for them until they come of age this £400, which will be about £130 each, and allow them to live in the house of their father as an insolvent man surrounded with difficulties, or whether it would be better that they should live with their father as a solvent man able to meet his engagements. I am clearly of opinion that, this debt having been incurred for the benefit of the children, it having been spent for their education at the time they had the income, which was ever since 1873, I am bound on every principle I have adverted to, to say he must have the money for the past maintenance to enable him to discharge those debts which he has incurred for the purpose of educating his children, and I cannot in the slightest degree accede to the technical objection that it is too late to do that because it was not asked some two or three months ago. I am satisfied it is on the whole for the benefit of the wards that the father should have the money, 764] *and that it is my duty to give it, and I cannot accede to the objection on the part of the trustees.

The result will be, that the father will have the whole of the income for the future maintenance and education, and that he will have past maintenance to discharge himself of the debt which he has incurred. It will not be necessary to

fix the exact amount, but I do not see that the sum named is at all inordinate.

The costs of both applications, as between solicitor and client, must be paid out of the accumulated fund, and not out of the testator's general estate, because these legacies have been appropriated, and after payment of costs the father will have the rest of the fund.

Solicitors for trustees: *Saunders, Hawksford & Bennett*.
Solicitors for E. C. Davey: *Torr & Co.*

As to allowances for maintenance, see 1 Eng. Rep., 426 note; 8 Eng. Rep., 725 note; 5 Eng. Rep., 685 note.

For a case where the capital of a life insurance policy was allowed to be distributed or used for, the income being insufficient, see *Mellor's Trust*, ante, p. 518.

The question whether an allowance out of his estate shall be granted for the support of a ward, depends very much on the facts of the particular case.

It may, in some instances, be granted for past maintenance; but never, where one has taken and brought up an infant as a member of his family, without any apparent claim or expectation, until afterward, of an allowance from the estate for such support. And a guardian paying such charge cannot hold the estate therefor: *Folger v. Heidelberg*, 60 Mo., 284.

The testator, A. M., had been in partnership in business with one J. A., and died without any settlement of accounts, appointing A. P. and L. his executors. The testator had, besides his share of the partnership assets, a large amount of personal property and also real estate, which he specifically devised to his four sons, then infants, and appointed A. their guardian. The executors received the rents of the real estate and applied them to the maintenance and education of the testator's children. The real and personal estate having proved insufficient for the payment of debts, the executors were held liable to account to the creditors of the testator for the rents received by them and applied to the maintenance and education of the children: *Harrison v. Patterson*, 11 Grant's (U.C.), Chy., 105.

The widow of an intestate, having obtained letters of administration, received and got in his personal estate,

went into occupation of the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been appointed.

Held, that the personal estate, and the proceeds or profits of the real estate, come to her hands must first be applied towards payment of debts, then to reimburse her for sums spent in the infants' maintenance. No allowance was made to the administratrix for her improvements to the realty, but she was not to be charged with any increase in rental caused by such improvements: *Brazill v. Brazill*, 11 Grant's (U.C.) Chy., 253.

In a proceeding under the 12 Victoria, chapter 72, the mother of the infants was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered—which was accordingly effected—the proceeds being applied in payment of the debts of the estate, but no investment of the surplus was made, although that course was directed by the order; the whole of such proceeds, together with \$5,321 in addition, were expended in the support and education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate.

The court refused the application; notwithstanding that the master reported the amount claimed was a proper sum to be allowed: *In re Hunter*, 14 Grant's Chy., 680.

A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, and charged the same on the shares of two of the devisees; but the will was silent as to interest upon the legacy.

Held, that the infant was entitled to maintenance out of the estate of the

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testator, during her minority, to the extent (if necessary) of the interest on the legacy; and an inquiry as to the ability of the widow of the testator to maintain the infant was refused: *Binkley v. Binkley*, 15 Grant's Chy., 649.

Where the intention of a testator is, that a fund devised to his grandchildren shall not be expended during their minority, an allowance for the maintenance of the children may be decreed out of the interest, but not out of the *corpus* of said legacies: *Seitz's Appeal*, 87 Penn. St. R., 159.

Although the rule is, that the court will not break in upon the principal money for the maintenance and education of infant legatees, still, in a proper case, the court will so apply it, as well as to the advancement of the infants: *Ashbough v. Ashbough*, 10 Grant's Chy., 430.

The court will sanction the use of the *corpus* of an infant's estate, for his past as well as future maintenance, where the doing so is shown to be for his benefit: *Goodfellow v. Rannie*, 20 Grant's (U.C.) Chy., 425.

In a proper case trustees may be allowed payments made by them, for the maintenance and education of children, out of their capital. Under a general administration decree, the master may, without any special direction, take evidence as to payments by executors, for the maintenance and education of infants, out of their shares of capital, and report the facts: *Stewart v. Fletcher*, 16 Grant's Chy., 235.

Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or such previous time as the trustees might see fit to pay over to the legatees; and that in case of the death of either, the whole should be paid to the survivor; the will containing no gift over in case of the death of both; the court held that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees.

In such case, the executor and trustee presented a petition under the statute, 29 Victoria, ch. 28, sec. 31; and it appearing that the parents of the legatees had abandoned them; that the

legatees had no other means of support; and that the interest on their share of the residuary estate was inadequate for their support, the court made an order approving of the application of part of the principal to supply the deficiency. In re McDougall, 14 Grant's Chy., 609.

Where a testator by his will gave the residue of his real and personal property to his executors and trustees in trust, to sell the same, and, after satisfying certain charges, to expend and apply, for the maintenance and education of his minor children, such sums as they thought necessary for this purpose, and in subsequent parts of the will provided that such children were to draw, or be entitled to, equal shares of his estate, and that each should receive his or her share of the proceeds of the real estate, on marrying or arriving at maturity; and that until then the shares of such children should be invested and paid out as they required the same as aforesaid: *Gibson v. Annis*, 11 Grant's Chy., 481.

By deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one: Held, that the infant took a vested interest; and the court directed an inquiry as to her past and future maintenance: *Stewart v. Glasgow*, 15 Grant's (U.C.) Chy., 653.

It is the natural and legal duty of a father to support his children, and it is only under peculiar circumstances that he will be allowed to charge them for maintenance or education: *Tanner v. Skinner*, 11 Bush (Ky.), 120.

The mere fact that a mother has maintained her own children, raises in law no implied promise to pay; the presumption is that she did it gratuitously, and in the absence of any express or implied promise to pay her for maintaining them, she is not entitled to be reimbursed therefor: *Seitz's Appeal*, 87 Penn. St. R., 159.

In a suit upon a guardian's bond, an answer by the sureties that the guardian was poor and indigent, and was compelled to use the money sued for in support of the relator, and that he wrongfully refused to claim any allowance for the support of the relator, and asking that the amount so expended

may be set off against the claim of the relator, is bad : *Myers v. State*, 45 Ind., 160.

The law makes it the duty of a father to maintain his minor children ; but where a minor has a separate estate, the father, as natural guardian, has a right to apply so much of the income therefrom as may be necessary to defray the expense of giving to his said minor child a good education ; and a court of equity in stating his account will allow him a reasonable credit for such expenditure, and will further allow him a credit for whatever portion of such income he has beneficially applied to the support of such child during the period of minority : *Holtzman v. Castleman*, 2 MacArthur, 555.

In *Mitchell v. Webb* (2 Lea, Tenn., 152), the court, Cooper, J., said :

"It is well known that our decisions are not in unison on the rule in equity which should prevail where the guardian applies to have the sanction of the court of the acts already done, where no reason exists or is shown why the court was not applied to in advance (*Beeler v. Dunn*, 3 Head, 91 ; *Hester v. Wilkinson*, 6 Humph., 215, 219 ; *Roseborough v. Roseborough*, 3 Baxter, 314). My own inclination has been in favor of the earlier and more stringent rule (*Cohen v. Shyer*, 1 Tenn. Chy., 182), and this for the obvious reason that, if the application be made in advance, the interest of the minor is alone looked to, whereas, if made after the mischief is done, it is the interest of the guardian which is at stake. The issue is completely changed ; and, at any rate, the subsequent approval of the act of the guardian in breaking into the *corpus* of the ward's estate is one of the most delicate and responsible duties which devolves upon a court of chancery."

Although, where trustees advance to a father the interest of his infant son's fortune, the court may, in a proper case, even after the death of the father, hold it a due application of such interest towards the maintenance and education of the child, though the father may have had what might be considered ample means of his own, and had never applied to the court for its sanction ; yet, if the facts disclose that the money was paid by the trustees and received by the father, as an advance for his

own purposes and was secured by a deed executed to the trustees by the father, though no more than a deed to indemnify the trustees against the consequences of their breach of trust. The court will, on a bill filed by the child, the *cestui que trust*, against the trustees and the devisees and personal representatives of the father, enforce repayment to the child of the sums advanced by the trustees : *Culbertson v. Wood*, Irish Rep., 5 Eq., 28.

The executor and trustee under the will of E. R. McC., deceased, had not such discretionary power that he could pay all the income of the trust fund of \$25,000 for the support and maintenance of the infant *cestui que trust*, when it was not necessary or reasonable, although the will gave no direction for the accumulation of interest.

The allowance of \$700 per annum out of the income made by the chancellor, part of the amount paid to the father for the support of the infant, approved. The amount of the trust fund, the social position of the parties, and the fact that the father was without means to support his son, make such allowance proper and necessary.

The excess over this sum of \$700 paid by the trustee to the father must be returned by his estate to the trust fund, but no interest must be charged thereon, as it was paid in good faith by mistake, as to his discretionary power under the will, and he had no use or benefit of this excess of interest. It is not a case for the allowance of interest upon interest : *McKnight v. Walsh*, 24 N. J. Eq., 498.

In a suit for maintenance out of the property of infants, the master is usually directed to inquire and state what would be a proper sum to allow ; but no authority is given for the payment until the report is brought before the court for its approval, the object being the more effectual protection of the interests of the infants : *Murphy v. Lamphier*, 12 Grant's (U.C.) Chy., 241.

In *Fidler v. O'Hara* (16 Grant's (U.C.) Chy., 610), a step-father's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct.

Maintenance, under the statute of Upper Canada, in divorce cases, can only be ordered when the infant is un-

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der 12 years old, and is transferred to the mother's custody: *Matter of Eves*, 15 Grant's (U.C.) Chy., 580.

As to the power of the court to control discretion given to trustees and others, and when and how far it will do so, see 17 Eng. Rep., 19 note; 19 Eng. Rep., 181 note; *Id.*, 276 note.

Under his will, the testator authorized his executor named, "if and whenever he may think it advisable for the interest and benefit of my children," to sell any or all of his real estate and vest the proceeds, "or such part thereof as he may think right," in other real estate for the joint benefit of the testator's wife and children, "the part coming to my wife to revert to my children at her death." Held, that the wife took no title to the lands of which the testator died possessed, and that the power was personal and discretionary in the executor named, and upon his

refusal to qualify could never be executed: *Jones v. Fulghum*, 3 Tenn. Chy., 194.

A testator appointed his wife executrix and gave her the net income of his estate during her life, and upon her decease appointed his son Robert executor, and devised and bequeathed to him all the residue of his estate, to receive the rents, issues and profits thereof, and to apply "one-half of said net income to the use and for the maintenance and support of my son Robert Ireland (the executor), his wife and children, during the life of my said son Robert." Robert Ireland had but one child, the plaintiff in this action.

Held, that the executor had no discretion in distributing the income among the beneficiaries, but that each was entitled to receive the one-third part thereof: *Ireland v. Ireland*, 18 Hun, 862.

[7 Chancery Division, 764.]

V.C.M., Feb. 21, 1878.

NEWCOMEN V. COULSON.

[1878 N. 97.]

Practice—Discontinuance of Action—Undertaking as to Damages—Rules of Court, 1875, Order xxiii.

A plaintiff who had given an undertaking as to damages discontinued his action: Held, that the court would nevertheless direct a reference as to damages.

MOTION. The question arising on this motion was whether a plaintiff who discontinues his action under Rules of Court, 1875, Order xxiii, can do so without paying damages to a defendant to which he was otherwise liable; the rule only providing for payment of the defendant's costs of action.

The plaintiff brought the action to prevent the defendants, 1, from using a road; 2, from building a bridge. On giving the usual undertaking as to damages, the plaintiff obtained an interim injunction against the defendant to restrain him from building the bridge, but failed as to the road.

[765] *The plaintiff discontinued his action in March, 1877, and this motion was now brought by the defendants for damages according to the undertaking. The notice of motion was given on the 9th of February, 1878.

Glasse, Q.C., and W. W. Karlake, for the motion, relied on *Newby v. Harrison* ⁽¹⁾.

[MALINS, V.C.: In that case, I think, as damages were not asked for at the time, I should not have given them afterwards; but here the plaintiff has prevented the defendant from asking at the hearing, by discontinuing the action.]

Higgins, Q.C., and Procter, contra: The jurisdiction has gone with the discontinuance of the action: *Bingley v. Marshall* ⁽²⁾. Here there is no judgment of the court on the record, as there was in *Newby v. Harrison*, to give jurisdiction. No appreciable damage can have arisen from the order. The court has a discretion under the undertaking, and is not bound to allow what might be legal damages.

Glasse, in reply.

MALINS, V.C.: I cannot accede to Mr. Higgins's argument, that a plaintiff can deprive a defendant of his right to damages under the plaintiff's undertaking by discontinuing his action. If this suit had come to a hearing I should have considered that the proper time for the defendants to claim damages under the plaintiff's undertaking, and if they had not done so, I should have considered their right waived. But it was otherwise decided in *Newby v. Harrison*. Here the plaintiff has deprived the defendants of their proper opportunity to ask for damages, but it would be a most dangerous doctrine to hold that he can thus evade his liability. I was at first struck with the delay on the part of the defendants, but there was a delay of four months in *Newby v. Harrison*, which was not considered too much, and perhaps a year may not be considered too long to *wait. [766 Here there has been a delay of eleven months, during which negotiation probably went on. There must be a reference as to damages in the ordinary way.

Solicitors: *Bower & Cotton*, agents for Dodds & Co., Stockton; *Crowdy & Son*, agents for John Trotter, Stockton.

⁽¹⁾ 3 D. F. & J., 287.

⁽²⁾ 11 W. R., 1018.

An action at law could only be discontinued by entering an order to that effect with the clerk, and serving a copy or notice thereof: *Averill v. Patterson*, 10 N. Y., 500, 10 How. Pr. Rep., 85; *Bishop v. Bishop*, 7 Rob., 194.

See *Buffalo, etc., v. Johnson*, 42 N. Y., 215.

Where the defendant had appeared, the plaintiff in order to perfect a discontinuance was required to pay the defendant's costs: *Smith v. White*, 7

Hill, 520; *Averill v. Patterson*, 10 N. Y., 500; *Bedell v. Powell*, 13 Barb., 183; *Miller v. Hamilton*, 17 U. C. Com. Pl., 514; *Griggs v. Meyers*, 6 U. C. Q. B., 532.

And see *Buffalo, etc., v. Johnson*, 42 N. Y., 215.

If the costs are not paid, defendant may proceed as if no discontinuance had been attempted: *Hicks v. Brennan*, 10 Abb. Prac., 804, 420; *Cummins v. Bennett*, 8 Paige, 81; *Simpson*

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v. Brewster, 9 Paige, 245; *Saxton v. Stowell*, 11 Paige, 526.

It has been held in New York, since the code, that if defendant have employed an attorney he is entitled to costs, though no notice of appearance has been given: *Weigen v. Held*, 3 Abb. Pr., 462.

And so before the code: *White v. Smith*, 4 Hill, 166.

And as the code (old code, § 303) gives costs to the *party*, instead of the attorney, we can see no reason why the defendant is not entitled to costs as soon as the action is commenced, though he never employ an attorney. The cases, however, seem to hold otherwise: *Bliss's Code*, p. 1098, note a.

It is in the discretion of the court whether to grant or refuse an application for leave to discontinue an action on payment of costs: *Carleton v. Darcy*, 75 N. Y., 375; *Wilder v. Boynton*, 63 Barb., 547; *Leslie v. Leslie*, 3 Daly, 194; *Pacific*, etc., *v. Leuling*, 7 Abb. Pr., N.S., 37.

See, however, in *Wisconsin*, *Noble v. Strachan*, 32 Wisc., 314.

There is no valid discontinuance without an order of the court, and while, as a general rule, plaintiff may, on payment of costs, enter an order of discontinuance, give notice thereof and the cause is thereby discontinued, yet the court has the right to control the order; and where circumstances exist making a discontinuance without terms inequitable, the court may refuse it altogether, or except on terms, and may open an order entered *ex parte*: *Carleton v. Darcy*, 75 N. Y., 375.

Where, pending an action to foreclose a mortgage, a witness was examined *de bene esse* and his testimony was considered a defence to the action, the witness having died, plaintiff was not allowed to discontinue except on the terms of paying costs, and stipulating that in any future action for the same cause the testimony of the deceased witness might be read: *Young v. Bush*, 36 How. Pr., 240.

The power of the court to permit a discontinuance is unquestionable, but such power is never exercised when it would be unjust to grant it.

Plaintiff commenced an action for divorce against the defendant, the parties being husband and wife, upon the ground of adultery. The answer of

defendant denied the charge and set up adultery by the husband, and asked for judgment of divorce in her favor against him. Upon a petition by defendant for an allowance to her for counsel fees, and for her support *pendente lite*, a referee was appointed to ascertain and report what allowance, if any, should be made to the defendant. Several hearings have been had before said referee, but no report has yet been made. Plaintiff moves for leave to discontinue. Held, that it would be unjust to grant it: *Campbell v. Campbell*, 54 How. Pr., 115.

A plaintiff may, with or without the consent of the defendants, *discontinue* an action, but he cannot thereby, unless assented to by the defendants, deprive them of any rights which they possessed.

Where one of two defendants, in an action asking for an injunction against them, is served with the summons and complaint but does not appear in the action, and the action is discontinued by consent of the attorneys for the respective parties on payment of costs, but without the knowledge or consent of said defendant who did not appear, and the undertaking executed therein cancelled:

Held, that the rights of the defendant who did not appear were not affected by such discontinuance, and the order cancelling the undertaking was a nullity, and that upon entering the order of discontinuance he had an immediate right of action upon the undertaking, it appearing that his rights and interests were diverse and separate from the other defendant: *Cunningham v. White*, 45 How. Prac. Rep., 486; *Pacific*, etc., *v. Leuling*, 7 Abb., N.S., 37.

In suits in equity, the complainant could not discontinue without an order of the court allowing him so to do: 1 Barb. Chy. Pr., 225.

In order to defeat a plea of former suit pending, the discontinuance must have been perfected before answer: *Bedell v. Powell*, 13 Barb., 183; *Swart v. Borst*, 17 How. Pr. Rep., 69; *Lord v. Ostrander*, 43 Barb., 339; *Wright v. Ritterman*, 4 Rob., 710.

But see *Clark v. Clark*, 7 Rob., 276.

After service of a notice of motion on the ground of irregularity, the party committing the irregularity cannot rec-

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Bolton v. London School Board.

V.C.M.

defendant that he shall not accept such payment from him until the costs of the suit are paid, he can recover the costs as well as the principal claim by adhering to such notice. But if, on the contrary, the plaintiff accepts and uses the amount thus paid by the defendant, he extinguishes the debt and no costs can be recovered upon it: *Keeler v. Van Wie*, 49 How. Pr. R., 97.

[7 Chancery Division, 766.]

V.C.M., Feb. 28, 1878.

BOLTON V. LONDON SCHOOL BOARD.

[1878 B. 98.]

Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78)—Recitals in Deeds Twenty Years old—Practice—Injunction till further Order.

A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase-money, but the purchaser was not to be considered as accepting the vendor's title:

Held, that this clause had the same operation as the 85th section of the Lands Clauses Act (8 Vict. c. 18), and the purchaser was entitled, upon depositing the purchase-money, not only to take possession, but to pull down the house, that being the object for which the purchase was effected.

Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required.

Where an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period except with the leave of the court.

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ANSWER.

1. The statement of claim in an action for specific performance stated that the predecessor in title of the plaintiff, by his agent lawfully authorized, signed an agreement with H., the predecessor in title of the defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that H., the predecessor in title of the defendant, was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by H. or any person by him lawfully authorized:

Held (affirming the decision of Fry, J.), that, under the statement of defence, the defendant could only enter into evidence to show the unsoundness of mind of H., and could not enter into evidence to show that the agent was not duly authorized. *Byrd v. Nunn*.

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ASSIGNMENT.

1. If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute:

Thus, where, after decree in a foreclosure action the mortgagor's interest had been purchased by A., and the mortgagee's interest by B., and an order was afterwards made for foreclosure absolute on an *ex parte* application by the plaintiff, the mortgagee, A. and B. were, on motion by A., ordered to be made co-defendants, and a subsequent motion by B. to discharge that order as irregular on the ground that the action was, in fact, at an end, was refused.

2. A party who has been served with a notice of motion, but has no interest in the subject-matter, is not entitled to appear by counsel on the motion merely to ask for his costs.

Thus, where the plaintiff in a foreclosure action, who had parted with his interest, had been served with a notice of motion to reopen foreclosure absolute, and appeared by counsel on the motion and asked for his costs, he was held not to be entitled to his costs of appearance; but inasmuch as, upon his being served with the notice of motion, no intimation was given him that he need not appear, and no tender was made to him of his costs of being advised as to the effect of the motion, he was allowed 40s. costs. *Campbell v. Holyland*.

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3. A., for good consideration, gave B. a written undertaking to "pay over" to him all dividends that he should receive on his proof against a bankrupt's estate. A. became bankrupt and B. then gave notice of his claim to the trustees in the first bankruptcy:

Held, that there was a good equitable assignment of the dividends, and that B. was entitled as against A.'s trustee in bankruptcy. *Matter of Irving*.

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ATTORNEYS.

1. The plaintiff, a widow with children, being possessed of property left by her

first husband, married, and marriage articles were prepared upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life. The bill was filed by the wife to rectify the settlement against the husband and the solicitor who prepared the settlement:

Held, by the Vice-Chancellor, that upon the evidence, the limitations were contrary to the intention of the plaintiff, and that the husband, having undertaken as agent for the wife to have a settlement prepared, was bound to have such a contract prepared as the court would sanction, and such contract would give the wife the first life estate in her own property. A decree was therefore made to rectify the settlement.

2. The husband, and the solicitor who prepared the settlement (who in the view of the Vice-Chancellor had failed in his professional duty, and had by his neglect and misconduct caused the litigation), were ordered to pay the costs of the suit:

Held, on appeal by the solicitor, that as he had not been guilty of participation in a fraud, but at most only of a blunder for which the remedy was an action for professional negligence, there was no jurisdiction to order him to pay the costs of the suit. *Clark v. Girdwood*. 363, 376 note.

3. By an order made in an administration suit, the costs were ordered to be taxed, and the plaintiff's costs to be paid to his solicitor, B., out of a specified fund in court. Before the costs had been taxed the plaintiff obtained an order to change his solicitor, and B. no longer acted for any party in the suit:

Held, that B. was entitled to a charging order, under 23 & 24 Vict. c. 127, upon the interest of his client in the funds in court, notwithstanding the prior order for payment out of a certain specified fund; but that such order ought not to extend to directing a sale, but must be limited to giving the parties liberty to apply. The fact that the plaintiff had in the meantime assigned his interest with the knowledge of B. made no difference.

4. *Held*, also, by Bacon, V.C., that B. had a right to retain the papers in the suit

till his costs were paid. *Pitcher v. Arden*. 807

5. The plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the defendants. This mortgage was sent to the solicitor of the plaintiffs for his perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the plaintiffs' solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under 23 & 24 Vict. c. 127, s. 28, on the interests of the plaintiffs:

Held, by the Master of the Rolls, that the charge ought to be postponed to the mortgage to the defendants.

6. *Held*, on appeal, that as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment. *Faithfull v. Ewen*. 662

7. An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the ground, 1, of undue influence, 2, that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. *Watson v. Rodwell*. 765

See UNDUE INFLUENCE, 241, 252 note.

AUCTIONEERS.

1. Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought. *Egmont v. Smith*. 92

B.

BANKRUPTCY.

1. Proof in the liquidation of the estate of a mortgagor under the Bankruptcy Act, 1869, by a first mortgagee, for his whole debt, and giving up the security to the trustee, put the trustee, under the operation of the statute, in the place of the first mortgagee, and do not accelerate the rights of subsequent mortgagees. *Cracknall v. Janson.* 302

2. By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay; and the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at £2,052 8s., and a claim for that amount was taken in by the settlement trustees, and in December, 1875, was admitted as a proof. In April, 1876, a dividend of 10s. was declared, but before the amount reached the hands of the settlement trustees, the husband, on the 13th of May, 1876, died. At that time the sums which had been disbursed by the settlement trustees amounted to £766 5s.:

Held, that the settlement trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums with such interest as the dividend had been actually making. *Matter of Miller.* 356

3. A horse dealer supplied a customer with a pair of horses, for which she paid £170, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the £170, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses:

Held, that the horses were in the bankrupt's order and disposition; and

that the customer could not enforce a lien on them as against the trustee in bankruptcy. *Matter of Roy.* 414

4. The expression "notice of any act of bankruptcy available for adjudication" used in sect. 31 of the Bankruptcy Act, 1869, means notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered.

Therefore a creditor who contracted a debt with a bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of the petition upon which the adjudication is made, is not precluded by sect. 31 from proving under the adjudication. *Matter of Crosbie.* 437

5. A mortgage of smelting works to secure the repayment of an advance of £55,000, contained, in addition to the ordinary clauses, a covenant by the mortgagee that, if the interest was punctually paid as it became due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagor should not have become bankrupt or have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of the mortgaged property, and should not have ceased to carry on his business thereon, then the mortgagee would not for a period of five years require payment of the principal. And the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged property at the yearly rent of £20,000, to be paid half-yearly on the days on which the interest on the mortgage debt was made payable. The deed was not registered under the Bills of Sale Act. It was admitted that the letting value of the property was not more than £3,000 per annum. Four months after the execution of the mortgage the mortgagor filed a liquidation petition, and the mortgagee afterwards claimed the right to distrain the chattels upon the mortgaged property for a year's rent under the attornment clause:

Held, that the arrangement was a mere device to give the mortgagee an additional security in the event of the mortgagor's bankruptcy, and was,

therefore, in that event, void, as a fraud upon the bankrupt law, and that sect. 34 did not protect a distress levied for a mere sham rent.

The mortgagee was, therefore, restrained from levying a distress for the rent. *Matter of Williams.* 469

6. The goods of a trader were seized on the 19th of August under an execution in respect of a judgment debt of £115. The holder of a bill of sale for £37 10s. claimed the goods, and the sheriff issued an interpleader summons. On the 28th of August a judge ordered that the sheriff should sell the goods, and out of the proceeds pay £37 10s. into court, and pay the balance to the execution creditor, and that an issue should then be tried between him and the bill of sale holder as to the property in the goods at the time of the seizure. On the 7th of September, before the sheriff had sold, the trader filed a liquidation petition:

Held, that the trustee in the liquidation was entitled to the goods, subject to the claim of the bill of sale holder. *Matter of Halling.* 483

7. A debtor who has filed a petition for liquidation in bankruptcy and has effected a composition with his creditors, has complete dominion over his property, and full power to dispose of it until, upon action taken by his creditors under the Bankruptcy Act, 1869, s. 126, the composition has been set aside and the debtor adjudged a bankrupt; and a purchaser from him is not bound to inquire as to the payment of instalments under the composition. *Matter of Kearley.* 759

8. A trader, who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself and the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him and the remainder to other children, and subsequently he became bankrupt:

Held, that the covenant was not void under sect. 91 of the Bankruptcy Act, 1869. *Matter of Andrews' Trusts.* 774

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1. The drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonored and protested, to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonor, including the expenses of re-exchange. *Matter of General South, etc.* 774

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CHARITY.

1. A testatrix bequeathed to an hospital all her household furniture and other things in her dwelling house, and also all her ready money, money at the bankers, and money in the public stocks or funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property, real or personal:
Held, that the charitable bequest was a specific bequest, and that the debts, funeral and testamentary expenses, and costs, must be paid first out of the undisposed of personal estate, next out of the real estate, and lastly out of the specific bequest; but that the specific bequest must exonerate the real estate from probate duty.
2. The testatrix, long before her death, had granted a lease of a house for thirty-one years at a low rent, with a premium of £600, which had not been paid:
Held, that the unpaid premium being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity.
Shepherd v. Beetham. 195
3. To constitute a gift to the "poor" or "poorest" of a specified class of persons a charitable gift, it must be construed as a gift to the actually poor,

parish, to a right of pasture upon the lammas lands for all their cattle commonable thereon during the season aforesaid, and under such regulations as should from time to time be prescribed;" (2) an injunction restraining the defendant from inclosing any part of the lammas lands, and from destroying the pasture thereon, and otherwise interfering with the exercise by the plaintiffs and such other owners and occupiers as aforesaid of their said rights; and (8) the quieting the plaintiffs and the other persons entitled as aforesaid in the possession of their said rights.

The defendant demurred to the statement of claim on the ground that the prescriptive right thereby claimed was uncertain and unreasonable, and could not be claimed for such a body of persons as that for whom the same was claimed; and that the general right set up by the plaintiffs could not be claimed by prescription.

Demurrer allowed, with costs, but with liberty for the plaintiffs to amend.

2. In order to make a right of pasture over common or lammas lands appurtenant to particular lands there must be some relation between the enjoyment of the right and the enjoyment of the particular lands; that is, there must be some connection between the beasts used on those particular lands and the number or description of beasts that may be depastured on the common or lammas lands: as, for instance, where the right claimed is for the beasts which plough the particular lands; or, for every beast used on such lands not exceeding a certain number.

3. In an action claiming rights of pasture, or rights of a like nature, it is the duty of the court, as far as possible, to attribute a legal origin to such rights, where there is evidence of long continued user, but that duty can only be discharged at the trial. *Baylis v. Tysen-Amhurst*. 109

4. A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or an owner of land who keeps pigs, to go into the wood of the grantor and allow the pigs to eat the acorns or beech-mast which have fallen to the ground, and does not prevent the owner of the wood from

lopping the trees in the ordinary course of management, or from cutting them down for timber when ripe. *Chilton v. London*. 714

5. A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by Crown grant or act of Parliament.
6. A grant by the Crown of a *profit a prendre* out of Crown lands to the inhabitants of a parish, constitutes the inhabitants a corporation *quoad* the grant, and an action to establish any such right is maintainable only by the inhabitants as a corporation, and not by an individual inhabitant suing on his own behalf alone:
7. *Semble*, a grant to the "inhabitants" of a parish lying within a manor of a *profit a prendre* out of the manorial waste, means a grant to the inhabitants of houses lawfully erected within the parish, and does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed.
8. The court will not presume a non-existent act of Parliament as an origin for an alleged right. *Chilton v. London*. 832

COMPLAINT.

See COUNTER-CLAIM, 814, 818 *note*.

COMPOSITION.

See ILLEGAL AGREEMENT, 782.

CONDITION.

1. The plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Queen Elizabeth, wherein the grantor reserved to himself and his heirs male a rent-charge of 7s. 8d., and which com-

tained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon.

The defendant, claiming title under a demise from a defendant of the same grantor, had for more than twenty years worked from mines of his own under adjacent lands, into, and had taken coals from, the mines under the plaintiffs' lands :

Held, first, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it; secondly, that the defendant had not acquired any title to the mine by possession under the Statute of Limitations, and that the plaintiffs were entitled to an injunction with an account for six years; and thirdly, that, as the defendant had been working under a *bona fide* belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal as well as bringing it to bank. *Ashton v. Stock*. 292

2. The erection of a building, to be used for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions, *held* to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade."

3. Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance. *German v. Chapman*. 565, 576 note.

CONFIDENTIAL RELATIONS.

See UNDUE INFLUENCE, 241, 252 note.

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CONFUSION.

See CONDITION, 292.

CONSIDERATION.

See GUARANTY, 477, 482 note.

CONSTRUCTION.

See GUARANTY, 477, 482 note.
WILLS, 63, 653, 659 note.

CONTINGENT DEBT.

See BANKRUPTCY, 356, 377.

CONTINGENT REMAINDER.

See WILLS, 789.

CONTRIBUTION.

See STOCKHOLDERS, 72.

CONVEYANCES.

See WILLS, 819.

COPYRIGHT.

1. On the 10th of March, 1869, an opera composed by O., a French subject, was first represented at a theatre in Paris. On the 28th of March, 1869, a piano-forte arrangement of the music of the opera, made by S. with O.'s consent, was published at a shop in Paris, and about the same time an arrangement by S. for piano and voices was also published. In June, 1869, O. assigned the opera and the copyright and the right

of public representation to B., an English subject, and handed over to him the MS. score. Upon this assignment a registration was made under the International Copyright Act (7 Vict. c. 12), s. 6, and a copy of the pianoforte arrangement was deposited at Stationers' Hall. The entry on the register gave the title of the opera, the name of the composer, the name of the proprietor of the copyright (describing him as the proprietor of the copyright in the music and the right of publicly performing such music), the time and place of first publication, "28th March, 1869, Rue —, Paris, France," and also the time and place of first representation, "Théâtre —, Paris, France, 10th March, 1869," but did not mention the name of S., nor did it in any way, except by the entry of the time and place of first publication, refer to the pianoforte arrangement. In August, 1869, four separate instrumental parts of the opera were published, but the rest of the score remained in MS.

In 1874, F. brought out at his theatre in London an opera in English under the same title, and announced as with music by O., a substantial part of the music of which was taken from one of the arrangements by S.

In a suit by B. to restrain F. from infringing his copyright in the opera and sole right of public representation :

Held, by Bacon, V.C., that the registration was defective under the International Copyright Act (7 Vict. c. 12), in not mentioning the name of S. as the author of the pianoforte arrangement, the thing really registered, and from which alone F. had taken the music, and gave B. no title to sue for an infringement of his alleged right.

2. *Held*, on appeal, that what was intended to be registered was the opera by O., and not the book containing the pianoforte arrangement by S.; and that as the proper entries for that purpose were made, the additional entry of a date applicable only to the arrangement by S., and the deposit of the book containing that arrangement, did not invalidate the protection which would otherwise have been obtained of the sole right of performing the opera :

3. *Held*, further, that the omission of the plaintiffs to deliver to the officer of the Stationers' Company a copy of the four instrumental parts which were

published in August, 1869, did not invalidate the protection obtained by the registration, such publication not being a publication of the opera within the meaning of the statute 7 Vict. c. 12, and the convention with France under that act :

4. *Held*, further, that a dramatic representation in which a substantial part of the music of O.'s opera was performed was an infringement of the sole right of publicly performing that music, though the operatic score was obtained by independent labor bestowed on the arrangement of S., which was not protected. *Boosey v. Fairlie*. 592

CORPORATE ELECTIONS.

See CORPORATIONS, 232.

CORPORATIONS.

1. The plaintiffs were a joint stock company which was formed for the purpose of purchasing and working a colliery and ironworks formerly the property of J. Bagnall, deceased. Before the company was formed J. Bagnall's trustees entered into negotiations with R., a financial agent, to get up a company for the purchase of the property for about £300,000. R. applied to C., and C. made an arrangement with G. upon the terms stated below. Two contemporaneous agreements were signed, by one of which the trustees agreed to sell the property to a trustee for the company for £300,000; and by the other, which was called in the pleadings the secret agreement, the trustees agreed with C. that he should bring out the company or forfeit £20,000; and that they should pay £85,000 for commission and risk. On the same day C. agreed with G. that G. should take the whole risk of bringing out the company, and should receive £60,000 and C. £25,000 of this bonus. D. & Co., the vendors' solicitors, were to receive £1,500 from the tenant for life of the property if the purchase was completed.

The company was established, the first directors being found by R.; and D. & Co. become the solicitors of the new company. The prospectus and

articles referred to the agreement for the purchase of the property, but made no mention of the agreement between the vendors and C., or of any of the arrangements relating to it. The purchase-money was paid to the vendors, who paid out of it £83,000 to C., of which he gave £80,000 to G. and £10,000 to H. The directors were not informed by D. & Co., or any other person, of the agreement between the vendors and C.; but some time afterwards they discovered it, and thereupon called a general meeting of the company to consider the subject. The result was that a bill was filed by the company against the vendors and against R., C., G., and D. & Co., praying that the purchase might be rescinded, or that the defendants might be held liable to repay all the profits which they had made by the transaction; the plaintiffs offering to allow expenses properly incurred and a fair commission.

Before the cause came to a hearing the plaintiffs compromised the suit with the vendors, receiving from them £31,000 as the price of not insisting on the purchase being rescinded:

Held (affirming the decision of Bacon, V.C.), that the suppression in the prospectus of the agreement between the vendors and C. was unjustifiable; and that the defendants R., C., and G. were in a fiduciary relation to the intended company, and therefore could not be allowed to retain any profit which they had made without disclosing it to the company:

2. *Held*, also, that the compromise with the vendors did not affect the claim of the plaintiffs against the defendants R., C., and G., and that the last named defendants had no claim to any allowance in respect of the £31,000 paid by the vendors on such compromise:

3. But *held* (varying the decision of the Vice-Chancellor), that the defendants R., C., and G., were entitled to be allowed their expenses properly incurred in bringing out the company; and that although they would not have been entitled to any commission unless the plaintiffs had offered to allow it in their bill, the plaintiffs could not retract their offer, and a fair commission must be allowed:

Held, also, that although D. & Co. had acted improperly in concealing

from the company the agreement between the vendors and C., they ought to have been dismissed from the suit when the plaintiffs elected not to rescind the purchase; and inasmuch as D. & Co. had acted in the matter with no fraudulent intent, the court dismissed the suit against them without costs up to the time of the compromise, and with costs as to all subsequent proceedings. *Bagnall v. Carlton*. 1,

38 note.

4. A company mortgaged freehold and leasehold property to K., one of their directors, who then sub-mortgaged it to H., a stranger, but neither of the securities was registered under sect. 43 of the Companies Act, 1862, the company never having kept a register of securities. K. took possession under his mortgage, and the company was afterwards ordered to be wound up. The title deeds of the property were in H.'s possession.

5. A summons by the official liquidator that K. and H. might be ordered to deliver up possession of the property and title deeds, was dismissed with costs. *International Pulp, etc.* 157

6. Where a reconstruction scheme was resolved upon at a meeting of debenture holders under the act of 1870, the court held that the holders of debentures passing by delivery were not entitled to vote unless they produced their debentures at or before the meeting:

7. *Held*, also, that the court would not sanction a reconstruction scheme resolved upon by a majority of debenture holders, if it should appear that persons voting in favor of the scheme were not acting *bona fide* in the interests of the debenture holders. *Matter of Wedgwood, etc., Coal Co.* 232

8. A banking company which had been registered under the Companies Act, 1862, obtained demises of premises from the plaintiff, and covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding-up of the company, though it was not insolvent. A question having arisen as to plaintiff's claim for the future rent, he brought an action for an injunction to restrain the distribution of the assets until the liability of the company had been provided for:

Held, that the lessor was entitled to have a sum set apart which, when invested in consols, would, with half yearly rests, be sufficient to produce the amount of the rent. *Oppenheimer v. British, etc.* 806

9. A syndicate was formed for the purchase of a coal mine from A., with a view to forming a company to take the mine. The mine was accordingly agreed to be conveyed by A. to B. (who was to establish a company for taking over the mine) in consideration of £86,000, of which £42,000 were to be in paid-up shares of the intended company. The memorandum of association stated that the capital was to be £200,000 in 20,000 shares of £10 each. The articles of association stated that the mine belonged to the persons named in the schedule of an agreement to be executed immediately after the registration of the articles, and that 15,000 paid-up shares were to be allotted to them in the proportions mentioned in the schedule. Soon afterwards B. declared himself a trustee for the company, and subsequently to this the agreement referred to in the articles was executed, and by it B. declared that he had entered into the agreement for the purchase of the mine on behalf of the persons named in the schedule (being A., the members of the syndicate and their nominees), and that they declared they held the mine in trust for the company; and that 15,000 paid-up shares were to be allotted to them in the proportions therein mentioned. This agreement was registered under the 25th section of the Companies Act, 1867. A., besides the shares representing the purchase-money of the mine, purchased 8,520 from one of the members of the syndicate, and other persons. The directors issued a large number of debentures on the security of the property of the company, but no other shares were issued except those 15,000 paid-up shares. The company being wound up:

Held (reversing the decision of *Malins, V.C.*), that the registered agreement was made *bona fide* and for good consideration, and was a sufficient contract in writing within the 25th section of the Companies Act, 1867; and that there was nothing in the circumstances to estop A. from claiming the shares which he had purchased, as paid-up shares.

10. Whether a memorandum in writing under which a person is to take paid-up shares without any consideration, is a contract within the 25th section of the Companies Act, 1867, *Quære*:

11. *Held*, also, that there was no inconsistency between the memorandum and articles of association in the fact that the memorandum stated the capital as consisting of 20,000 shares, and the articles stated that 15,000 of these shares were to be taken as paid up. *Anderson's Case.* 414

12. A company can ratify a contract which was made by its promoters when the company was not in existence. *Spiller v. Paris, etc.* 640, 642 *note*.

13. A company in course of liquidation retained for the convenience of the winding-up the possession of leasehold premises of which they were in occupation as assignees of a lease containing the usual proviso for re-entry by the lessors:

Held, that leave should be given to the lessors to distrain for rent accrued due after the commencement of the winding-up, but not for rent accrued due before that time, as to which they must prove as creditors in the winding-up. *Matter of North Yorkshire, etc.* 793

See DIRECTORS, 464, 468 *note*.
MORTGAGEES, 618, 715.
STOCKHOLDERS.

COSTS.

1. A testator bequeathed a sum of consols and the residue of his personal estate to trustees to hold in equal fifths upon certain trusts. One fifth share lapsed. In a suit for the administration of the testator's real and personal estate:

Held, that the costs of the suit were payable out of the general personal estate, and not primarily out of the lapsed share. *Penton v. Wills.* 384

See ASSIGNMENT, 483.

ATTORNEYS, 765.

CORPORATIONS, 1, 38 *note*.

EXECUTORS AND ADMINISTRATORS, 642.

PARTITION, 156.

TRADE-MARK, 334.

COUNTS.

See COUNTER-CLAIM, 814, 818 note.

COUNSEL.

See ATTORNEYS, 368, 376 note.
UNDUE INFLUENCE, 241, 252 note.

COUNTER-CLAIM.

1. A counter-claim must claim relief against the plaintiff, and he must be made a party to it. The relief claimed by a counter-claim must relate to the specific subject-matter of the action.
2. Where a counter-claim sought indemnity:
Held, that the indemnity must be confined to the specific property which was the subject of the action. *Harris v. Gamble*. 310
3. A counter-claim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed.
4. It is not sufficient that the facts relied upon appear in the statement of defence, even though that and the counter-claim form one continuous document.
5. A counter-claim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused. *Croce v. Barnicot*. 314, 818 note.

COVENANT.

1. Not to build beyond certain line. *Kerr v. Preston*. 86, 91 note.
2. When binds after-acquired property. *Matter of Mitchell's Trusts*. 224
3. Where the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to

prevent previous unimportant breaches of the covenant.

4. An assignee of land with notice of a covenant is subject to the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other. *Richards v. Revitt*. 539, 541 note.
5. The lease of a public house granted by a brewer to a publican contained a covenant by the latter for himself, his executors, administrators, and assigns, to purchase from the brewer all the beer consumed at that public house, and also at another public house of which the publican held a lease under a different landlord:
Held, that the covenant was binding in equity upon an assignee of the second public house who had notice of the covenant.
6. *Keppell v. Bailey*, so far as it is a decision that a restrictive covenant as to the use of land, which does not run with the land at law, is not binding in equity upon an assignee with notice, has been overruled by more recent cases.
7. The lease of the first public house contained also a covenant by the brewer that he would supply the publican with all the beer required for consumption at both the public houses, such beer to be of a specified quality and price:
Held, that the obligation of the lessee's covenant was conditional upon the performance by the lessor of his covenant.
8. The assignee of the lease of the second public house borrowed money of the brewer upon the security of a mortgage of that lease, and in the mortgage deed he covenanted with the brewer to buy of him all the beer consumed at that public house:
Held, that this covenant was subject to an implied obligation on the part of the brewer to supply good marketable beer. *Luker v. Dennis*. 542
9. A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related

to the subject-matter of the conveyance.
Manson v. Thacker. 759, 763 *note*.

See CONDITION, 292, 565, 576 *note*.
SETTLEMENT, 267.

CREDITORS.

1. A testator gave an annuity to his son, with a proviso that if he should "at any time do or permit any act, deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or incumbered in any manner whatsoever," the annuity should cease. The son neglected to comply with a debtor's summons, and was thereupon adjudicated a bankrupt:

Held, that the annuity ceased. *Matter of Eyston.* 469, 475 *note*.

See EXECUTORS AND ADMINISTRATORS, 830.

CRIMINAL LAW.

See INJUNCTION, 86, 91 *note*.

CURTESY.

See MARRIED WOMEN, 581.

CY PRES.

See CHARITY, 832.

D.

DAMAGES.

1. When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy be determined in the ordinary course by landlord or tenant or on a notice to quit given by the vendor at

the request and for the convenience of the purchaser, to relet the farm on a yearly tenancy so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet.
Egmont v. Smith. 92, 100 *note*.

See BILL OF EXCHANGE, 794.

CONDITION, 292.

LIGHT, 309, 331 *note*.

DEBTORS.

See CREDITORS, 469, 475 *note*.

DECLARATION.

See COUNTER-CLAIM, 314, 318 *note*.

DEFENCE.

See ANSWER, 577.

DEFENDANTS.

See EXECUTORS AND ADMINISTRATORS, 525, 531 *note*.

DEVISE.

See REAL ESTATE, 136, 143 *note*, 168.

DIRECTORS

1. How far mortgage to valid, and may be enforced. *International, etc.* 157
2. The articles of a limited company, after naming the original directors, gave to the directors for the time being power to appoint new directors at any time before the first general meeting. It was then provided that no person should be qualified to be a director who was not a holder of shares in the company of the nominal value of £500; and that no person except the original

directors, and such person as might be appointed by them, should be qualified to be a director who had not been a holder in his own right of such shares for at least six months.

J. was appointed a director by the original directors, and attended several meetings of the board, but never applied for or acquired any shares, and when the company was wound up his name was not on the register of shareholders :

Held (affirming the decision of the Master of the Rolls), that the holding of the necessary number of shares was a condition precedent to the election of a director, and that J.'s election was therefore void ; that his acting as director was no evidence of a contract to take the shares ; and that his name could not be placed on the list of contributories. *Jenner's Case*. 464, 468 note.

See CORPORATIONS, 1, 38 note.

DISCONTINUANCE.

1. A plaintiff who had given an undertaking as to damages discontinued his action :

Held, that the court would nevertheless direct a reference as to damages. *Newcomen v. Coulson*. 852, 853 note.

DISCOVERY.

See REDEMPTION, 206, 211 note.

DISSATISFACTION.

See SPECIFIC PERFORMANCE, 808, 813 note.

DOWER.

See LIFE ESTATE, 258.

E.

EMINENT DOMAIN.

1. A railway company agreed to purchase for £600 the fee simple of lands, of

which W. was the true owner, from H., who was in possession of them. Afterwards finding that H. had only a possessory title of 19½ years, they paid the £600 into court to the account of "the party interested" therein, took possession, and executed a deed-poll under the 77th section of the Lands Clauses Consolidation Act, 1845, reciting their desire that the land should vest in them for all the estate of H., and purporting to vest in themselves the fee simple of the lands. No claim was made on behalf of W. either to the land or the purchase-money until after the expiration of twenty years from the time when H. had taken possession. Upon petition by persons claiming under H. for payment out to them of the £600 in court :

Held, as against the representative of W., that the petitioners were entitled to the £600, as being the money which the company had contracted to pay for the purchase of H.'s interest in the lands. *Matter of Winder*. 272

See OWNERS, 816, 819 note.

ELECTION.

1. A settlor, on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third, of all and singular his real and personal estate, should be settled for the benefit of the daughter, her husband, and their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime, leaving a husband, who also died in the settlor's lifetime, and two infant children, who survived the settlor.

The settlor made a will, whereby, after directing payment of his debts, he disposed of personal chattels, gave a number of legacies, and, amongst others, a legacy of £4,500, and part of the residue of his estate, to his nephews and nieces, and his two infant great-grandchildren above mentioned, in equal shares :

Held, that the liability under the covenant was not a debt to be paid before the division of residue, and that the infants were bound to elect between the benefits under the settlement

and under the will. *Bennett v. Howlands*.
258, 266 note.

See CORPORATIONS, 232.

ESTOPPEL

See HUSBAND AND WIFE, 649.
MARRIED WOMEN, 729.
STOCKHOLDERS, 692.

EVIDENCE.

See OPINION.
VENDOR AND VENDEE, 856.

EXECUTORS AND ADMINISTRATORS.

1. Where the assets of a testator have come into the possession of the executor and are afterwards lost to the estate, the rule at law as well as in equity now is, that the executor stands in the position of a gratuitous bailee, and therefore cannot be charged without some wilful default: Judicature Act, 1873, s. 25, subs. 11.
2. *Semble*, in an administration action under the new practice, an order charging an executor with wilful default may, in a proper case, be made at any time during the progress of the action. *Job v. Job*. 162, 165 note.
3. The legatee of an annuity charged upon residue is entitled to have judgment for administration of the estate. *Wollaston v. Wollaston*. 405
4. Mere refusal by a legal personal representative to sue for the recovery of outstanding assets will not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the legal personal representative and the alleged debtor to the estate.
5. The circumstances which would suffice to induce the court to answer in the affirmative an inquiry whether proceedings ought to be instituted, will in general suffice to entitle a person bene-

ficially interested to sue in his own name. *Yeatman v. Yeatman*. 525, 531 note.

6. A gift of a share of real and personal residue to a charity having failed except as to pure personalty:

Held, that the costs of an administration suit ought nevertheless to be borne by the general estate. *Blans v. Bell*. 642

7. Where an executor or administrator, after the commencement of a creditor's administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under Judicature Act, 1873, s. 25, subs. 11, and he will accordingly be held to have made a good payment, and will be allowed in passing his accounts, even though he may have had notice of the action before payment.

To prevent such payments being made in any such action, the plaintiff should, immediately upon issuing the writ, apply for and obtain a receiver. *European, etc., v. Radcliffe*. 830

See COSTS, 384.
HEIRS, 787, 788 note.
HUSBAND AND WIFE, 649.
INFANT, 820, 830 note.

EXECUTORY DEVICES.

See WILLS, 796.

EXTINGUISHMENT.

See COVENANT, 759, 763 note.

F.

FALSA DEMONSTRATIO.

See WILLS, 63.

FIRE WARDENS.

See MUNICIPAL CORPORATIONS, 86, 91 note.

FIXTURES.

1. After the trustee in a bankruptcy has executed a disclaimer of a lease vested in the bankrupt, he is not entitled, even though he be in possession of the leasehold premises, to remove the tenant's fixtures.

The effect of the disclaimer is to give the landlord an absolute title to the fixtures as from the date of the order of adjudication. *Matter of Stephens*. 458, 462 note.

FORECLOSURE.

See MORTGAGE FORECLOSURE, 508.

FOREIGN BILL OF EXCHANGE.

See BILL OF EXCHANGE, 774.

FOREIGN CORPORATIONS.

See MORTGAGES, 618.

FOREIGN SECURITIES.

See MORTGAGES, 618.

FORMER SUIT.

See HUSBAND AND WIFE, 649.

FRAUD.

1. A vendor sold land as freehold, received the purchase-money, and conveyed the land as freehold. Afterwards the purchaser, for the first time, discovered that the property was really copyhold. The vendor alleged that he made the representation believing it to be true:

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Held, that, assuming that he had made the representation *bona fide*, the vendor had committed a legal fraud; that the sale must be set aside and the purchase-money repaid with interest; and that the vendor must pay all the expenses which the purchaser had incurred in consequence of the purchase. *Hart v. Swaine*. 390, 395 note.

See ATTORNEYS, 363, 376 note, 765.

CORPORATIONS, 1, 38 note.

HUSBAND AND WIFE, 649.

ILLEGAL AGREEMENT, 782.

MARRIED WOMEN, 729.

NAME, 176, 182 note.

OPINION.

TRUSTS AND TRUSTEES, 280.

UNDUE INFLUENCE, 241, 252 note.

FRAUDS, STATUTE OF.

1. An offer in writing to take a lease of a theatre, signed by the intending lessee and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessee, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing:

Held, not to be an agreement in writing within the Statute of Frauds so as to entitle the lessor to have the same specifically performed. *Williams v. Jordan*. 116, 118 note.

2. When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of sect. 7 of the Statute of Frauds, is the beneficial owner only.
3. The absolute beneficial owner of land vested in a trustee wrote a letter to the mother of her infant grandson. The letter was signed with the writer's initials. Inclosed in the same envelope, but on a separate piece of paper, was another document in the handwriting of the same person, and headed "Supplement." This document was not signed in any way. It commenced thus: "I had quite omitted to tell you," but it contained no other reference to the letter, and the letter in no way re-

ferred to it. It was alleged that the "supplement" contained a declaration of trust of the land in favor of the infant:

Held, that the "supplement" was not signed so as to satisfy the statute. *Kronheim v. Johnson*. 407

See SPECIFIC PERFORMANCE, 379, 382 note.

G.

GAS COMPANY.

See NUISANCE, 533.

GIFT.

See UNDUE INFLUENCE, 241, 252 note.

GRANT.

See CONDITION, 565, 576 note.

GUARANTY.

1. The wife of a retail dealer who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you having at my request agreed to supply and furnish goods to C." (her husband), "I do hereby guarantee to you the sum of £500. This guarantee is to continue in force for the period of six years and no longer":

Held (reversing the decision of Fry, J.), that the guarantee was limited to goods actually supplied to the husband after it was given. *Morrell v. Cowan*. 477, 482 note.

H.

HEIRS.

1. Where real and personal estate are comprised in the same mortgage, the

mortgage debt must, as between the devisees of the realty and the legatees of the personalty, be borne ratably by the real and personal estate subject thereto, and the real estate is not, under Locke King's Act, primarily liable to the payment thereof. *Treatrail v. Mason*. 787, 788 note.

See WILLS, 519.

HUSBAND AND WIFE.

1. W., being entitled in right of his wife to a share of certain engravings which were in the hands of T. as agent for the parties entitled, sold his wife's share to T., subject to a stipulation that six engravings should be delivered to him in specie. He received the purchase-money, but the six engravings were not delivered. The owners of other shares made similar sales to T. W. died in the lifetime of his wife. The engravings remained in T.'s possession till his death, and were sold in a suit for the administration of his estate. W.'s executors after this filed a bill to set aside the sale of Mrs. W.'s share as obtained by fraud:

Held (affirming the decision of Malins, V.C.), that W.'s executors, and not the executors of the surviving wife, were the proper persons to sue.

2. In the administration suit an inquiry was directed what interest T. had at his death in the engravings in question, and if interested as owner, to what extent, and whether he became such owner as trustee, legatee, purchaser, or otherwise. In answer to the inquiry it was found that T. became entitled as purchaser, subject to the delivery of six of the engravings to each of the vendors, and that such delivery had been made under an order in the suit. W.'s executors were parties to these proceedings in respect of their right to the six engravings. An order on further consideration was made treating T. as owner, which was afterwards enrolled. The question of fraud had not been raised:

Held (affirming the decision of Malins, V.C.), that this decree did not interfere with a bill to set aside the sale for fraud. *Widgery v. Tepper*. 649

See MARRIED WOMEN, 397, 581.

I.

ILLEGAL AGREEMENT.

1. Where a creditor at the time of signing a composition deed under the 192d section of the Bankruptcy Act, 1861, took from the debtor a private agreement that the debtor should make future payments on his account:

Held, that the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder. *Matter of Lenzberg.* 782

ILLEGAL RESTRAINT OF TRADE.

See COVENANT, 542.

IMPROVEMENTS.

See REDEMPTION, 505.

INCOME.

See INSURANCE, LIFE, 518.

INDEMNITY.

See TRUSTS AND TRUSTEES, 666.

INFANT.

1. An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority.
2. By a settlement made with the sanction of the court, upon the marriage of a lady then, and therein described as, "an infant of seventeen years," certain funds belonging to her were vested in trustees upon trust to retain existing investments or reinvest "with

the consent" of the lady and her husband during their joint lives; the lady taking the first life interest under the settlement:

Held, that the lady had power to consent to a proposed reinvestment, notwithstanding her minority. *Matter of Cardross's Settlement.* 827, 830 note.

See REAL ESTATE, 102, 105 note.

INJUNCTION.

1. A court of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an act of Parliament for a breach of its enactments. *Kerr v. Preston.* 86, 91 note.

2. Upon motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the plaintiffs' trade,

The court was of opinion that notwithstanding the decision in *Prudential Assurance Company v. Knott*, it now had power by the Judicature Act, s. 25, subs. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application. *Thorley, etc., v. Massam.* 182

3. In an action for an injunction to restrain the erection of a building on a passage, over which the plaintiff claimed a right of way, where he had, on being informed of the defendant's intention, forthwith given him notice of his rights and commenced the action, and the defendant had, notwithstanding, continued and completed the erection of the building complained of,—the plaintiff's right having been established at the trial:

Held, that it was a case for a mandatory injunction and not for damages under Lord Cairns' Act. *Krehl v. Burrell.* 708, 707 note.

See COVENANT, 589.

DISCONTINUANCE, 852, 853 note.

LIGHT, 319, 381 note.

MILITARY OFFICER, 120, 129 note.

TRADE-MARK, 384.

INSANITY.

See ANSWER, 577.
LUNATIC, 377.

INSOLVENT STOCKHOLDERS.

See STOCKHOLDERS, 72.

INSURANCE, LIFE.

1. A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act.

The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate. *Mellor's Policy Trusts.* 518

See BANKRUPTCY, 356.

INTEREST.

1. When stockholders not entitled to, from stockholders, debt against corporation. *McKewan's Case.* 72

J.

JURISDICTION.

See MORTGAGES, 618.

L.

LACHES.

See ACQUIESCENCE, 86, 91 note.
CONDITIONS, 565, 576 note.
COVENANT, 539.
PRINCIPAL AND SURETY, 698, 702 note.

LAND.

See REAL ESTATE, 258.

LANDLORD AND TENANT.

1. Agreement to accept a lease of a dwelling house in London "to contain all usual covenants and provisos." The lease contained a covenant not to assign without lessor's consent. In an action to compel specific performance of the agreement:

Held, that the covenant was not a "usual covenant," and that the agreement could not be enforced. *Hampshire v. Wickens.* 708, 713 note

See BANKRUPTCY, 469.

CORPORATIONS, 798.

FIXTURES, 458, 462 note.

FRAUDS, STATUTE OF, 116, 118 note.

LEASE.

1. What are usual covenants. *Hampshire v. Wickens.* 708, 713 note.

See FRAUDS, STATUTE OF, 116, 118 note.

SPECIFIC PERFORMANCE, 379, 382 note.

LEGACY.

1. Bequest of "£1,000 D Stock in the London and North Western Railway Company, now standing in the names of the trustees of my settlement, and bequeathed to me by my late wife (and which stock it is my intention to have transferred into my name), unto A., B., and C. upon trust for A." The stock was never transferred into the testator's name, but was paid off by the company and reinvested, by his desire, in the purchase, in the names of the settlement trustees, of other securities:

Held, that the legacy was adeemed, and that the residuary legatees were entitled to the securities. *Harrison v. Jackson.* 625

See CHARITY, 195.

COSTS, 364.

CREDITORS, 469, 475 note.

ELECTION, 258, 266 note.

REAL ESTATE, 136, 143 note, 168.

WILLS, 521.

LEGATEE.

See EXECUTORS AND ADMINISTRATORS, 405.
REAL ESTATE, 136, 143 *note*, 168.

LEX LOCI.

See MORTGAGES, 618.

LIBEL.

See INJUNCTION, 182.

LIEN.

See ATTORNEYS, 607, 662.
BANKRUPTCY, 414.
MORTGAGES, 618.
TRADE-MARK, 334.
TRUSTS AND TRUSTEES, 280.

LIFE ESTATE.

1. Testatrix, being possessed of reversionary interests, bequeathed them to a tenant for life, with remainder over. Before the reversionary interests fell into possession, the devisee for life died.

The reversionary interests having afterwards fallen in :

Held, that, in estimating what was due to the estate of the devisee for life, the value of the reversions must be calculated as at the end of a year from the testatrix's death, on the assumption that they would fall in when they actually did; and that the devisee for life was entitled to £4 per cent. on that amount from the death. *Wright v. Lambert*. 258

See INSURANCE, LIFE, 518.
TRUSTS AND TRUSTEES, 280.

LIGHT.

1. A building containing ancient lights was pulled down and replaced by

another, in which the front was set back and a dormer window converted into a skylight:

Held, that the right to access of light was not lost.

2. *Per* JESSEL, M.R. (on motion for injunction): Any substantial alteration in the plane of the windows destroys the right.
3. *Per* FRY, J.: The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows.
4. Considerations on which the question of injunction or damages depends discussed. *National, etc., v. Prudential, etc.* 319, 331 *note*.

LIMITATIONS, STATUTE OF.

See CONDITION, 292.
EMINENT DOMAIN, 272.

LIS PENDENS.

1. Where an action which was registered as a *lis pendens* had been dismissed for want of prosecution, the court, on a motion made *ex parte* on behalf of the defendant, under 30 & 31 Vict. c. 47, s. 2, to vacate the registration, made an order *nisi*, the plaintiffs to show cause within one week why the order should not be made absolute. *Pooley v. Bosanquet*. 698

LUNATIC.

1. In 1854 a person entitled to a contingent future interest in a fund took the benefit of the Insolvent Act, but did not mention this interest in his schedule. In 1876 the contingent interest vested in possession. In the same year he was found lunatic, and shortly afterwards an order was made giving the holder of the fund liberty to pay it into court to the credit of the lunacy, and directing it to be invested and the income paid to the committee. Shortly

afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the Chancery Division for its recovery. The court ordered a transfer of the fund as prayed. *Matter of Hinds*. 377

See ANSWER, 577.

M.

MAINTENANCE.

1. A testator gave a legacy of £3,000 to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one:

Held, that the court had power to control the discretion of the trustees in the allowance to be made for children; and the court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance. *Matter of Hodges*. 840, 849 note.

See INSURANCE, LIFE, 518.

MARRIED WOMEN.

1. A woman, married since the passing of the Married Women's Property Act, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:

Held, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action. *Davies v. Jenkins*. 300

2. The separate estate of a married woman in earnings, under the Married Women's

Property Act, 1870, becomes upon her death equitable assets and divisible amongst her creditors *pari passu*, so that her executor has no right to retain in full his own debt thereout. *Thompson v Bennett*. 303

3. A married woman became in 1866 entitled, on the death of an intestate, to a share of his estate. Part of her share was paid by the administrator to the husband, and in 1867 some shares in a joint stock company, which had been appropriated by the administrator in respect of the remainder of the wife's share, were, with the assent of the husband and wife, transferred into their joint names. In May, 1874, the husband deserted the wife, and in November, 1874, she obtained from the justices a protection order, by which her property and earnings acquired since the date of the desertion were protected from her husband. In 1876 the company resolved upon a voluntary liquidation, and the liquidator gave notice to the husband and wife that he was prepared to refund £900 in respect of the capital of the shares. The wife thereupon (suing as a *feme sole* under the protection order) commenced an action against the company and the husband, claiming payment of the £900 to her as a *feme sole*. The money was paid into court:

Held, that the transfer into the joint names did not amount to a reduction into possession by the husband, and that the wife was entitled to the £900 as a *feme sole* under the protection order, as being property acquired by her after the desertion. *Nicholson v. Drury, etc.* 397

4. A married woman, under the limitations of a will made in 1846, was equitable tenant in tail to her separate use of certain freehold estates. By a clause in the same will she was also restrained from alienation of the rents and profits. Her husband became bankrupt, and after his order of discharge joined with his wife in barring the equitable entail and limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, and the husband's assignees claimed the husband's estate by curtesy:

Held (affirming the decision of Jessel, M.R.), that the restraint on anticipa-

tion did not prevent the wife from barring the entail and acquiring the equitable fee; and that the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate.

5. *Per Jessel, M.R.*: It is now settled that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy. *Cooper v. McDonald*. 581

6. A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation.

The mortgagees obtained a judgment against her for the amount lent, and a charging order to charge her next accruing dividend:

Held, that such charging order must be discharged; for in no case and by no device could the restraint upon anticipation be evaded. *Stanley v. Stanley*. 729

See HUSBAND AND WIFE, 649.

MARSHALLING ASSETS.

See CHARITY, 195.

MERGER.

See COVENANT, 759, 763 note.

MILITARY OFFICER.

1. *Semble*, where, under the powers of 5 & 6 Vict. c. 94, and the subsequent Defence Acts, land has been vested in the Secretary of State for War upon trust for the Crown, such land, and every part thereof, may be used for all reasonable *bona fide* military purposes that the government may require, and such user cannot be controlled by the court.

In an action to restrain the defendant, a general in Her Majesty's army, and the officers under his command,

from causing or permitting rifle practice on a common (forming part of the land thus vested) in close proximity to the plaintiff's house, which, as he alleged, was a serious nuisance and occasioned damage to his property—on motion for injunction:

2. *Held*, that to such an action, if sustainable, the Secretary of State for War was a necessary party:
3. *Held*, also, that the allegations in the statement of claim being insufficient, no interlocutory injunction could be granted. *Hawley v. Steele*. 120, 129 note.

MINES.

See CONDITION, 292.

WATER AND WATERCOURSES, 336, 345 note.

MISTAKE.

1. After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. *Attorney-General v. Tomline*. 645

See ATTORNEYS, 363, 376 note, 765.

SPECIFIC PERFORMANCE, 801.

WILLS, 63.

MORTGAGES.

1. A company with an office in London, and having house property at Florence, raised, under powers in their articles, a sum of money by the issue of "Obligations" payable to bearer, whereby they purported "to bind themselves, their successors and assigns, and all their estate, property, and effects," reserving the right to redeem a certain part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mortgage in the Italian form, registered at Florence, the company mortgaged the property to a bank with a London office, who had notice of the obligations. The bank having taken pro-

ceedings in the tribunal at Florence to enforce their mortgage, an action was brought on behalf of the holders of the obligations against the company and the bank, claiming to be mortgagees of the Florence property in priority to the bank. On motion to restrain the sale of the property :

Held, that the obligations were not mortgages, but simply bonds :

2. *Held*, also, that even if they created a charge on the company's property, they could not be enforced as against the bank claiming under a registered mortgage at Florence; and that, the matter being already before the tribunal of the country where the property was situated, this court would not interfere. *Norton v. Florence, etc.* 618

3. A deed dated in 1860 between a company, J. a director, and certain trustees, recited the acquisition of certain collieries by J. on behalf of the company, that the outlay had been provided as to £467,079 out of the company's money, and as to £43,216 by J. for the benefit of the company, and thereby J., in consideration of the repayment of the £43,216 being secured in manner appearing, conveyed the collieries to the trustees upon trusts to secure, first, the £467,079, and secondly, the £43,216 "so due to J." The holding of collieries being *ultra vires* the company, and an act of Parliament having directed the sale of the collieries, the property was sold and did not realize sufficient to pay the £467,079 :

Held, that the deed of 1860 did not constitute J. a specialty creditor of the company, but only operated to give him a charge upon the property comprised in the deed. *Jackson v. North Eastern, etc.* 715

See ASSIGNMENT, 483.

BANKRUPTCY, 302.

CHATTEL MORTGAGES, 495, 498 *note*.

HEIRS, 787, 788 *note*.

MORTGAGE FORECLOSURE, 483.

REAL ESTATE, 258.

REDEMPTION, 483, 505.

MORTGAGE FORECLOSURE.

1. The general nature of the circumstances under which foreclosure may be

opened, considered. *Campbell v. Holyland.* 483

2. Under a decree for foreclosure an agent of the mortgagees attended at the place appointed for payment of the money, and during the whole of the appointed time, but without any power of attorney to receive the money. No one appeared on behalf of the mortgagors:

Held, that the foreclosure ought to be made absolute. *Coz v. Watson.* 508

MORTMAIN.

See WILLS, 521.

MUNICIPAL CORPORATIONS.

1. The plaintiffs, owners of a house and area situate in and fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage but not beyond the limits of the area. After the completion of the alterations the defendants, the local authority, threatened the plaintiffs with summary proceedings before the justices for the recovery of penalties under the Public Health Act, 1875, on the ground that the plaintiffs had set forward their building without the written consent of the defendants under sect. 156 of the act.

The plaintiffs then moved *ex parte* for an injunction to restrain the defendants from taking these proceedings, alleging, 1, that as the alterations had been made over their own property, the defendants, in threatening proceedings, were acting *ultra vires*; 2, that the defendants, having had notice of the plaintiffs' intention to make the alterations, were bound by acquiescence; and 3, that the justices had no jurisdiction, as the defendants had not made their complaint within six months after the alleged offence, as required by sect. 252 of the act. Motion refused. *Kerr v. Preston.* 86, 91 *note*.

2. Having power to consent in writing not bound by tacit acquiescence. *Kerr v. Preston.* 86, 91 *note*.

N.

NAME.

1. Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person afterwards manufacturing is entitled to describe it by the name of such original manufacturer, and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name. *Massam v. Thorley's, etc.* 175, 182 note.

NEGLIGENCE.

- See EXECUTORS AND ADMINISTRATORS, 162, 165 note.
MILITARY OFFICER, 120, 129 note.
PRINCIPAL AND SURETY, 698, 702 note.
TRUSTS AND TRUSTEES, 452.

NOTICE.

- See BANKRUPTCY, 457.

NUISANCE.

1. By an act of Parliament reciting that under a former act incorporating the Gas Works Clauses Act, 1847, a gas company was under obligation to supply gas, the company was authorized to buy certain specified lands adapted for the purpose, the mode of supply was prescribed, and the gas was to be of a certain purity; but by this act and the Gas Works Clauses Act, 1847, it was provided that nothing in those acts contained should prevent the company from 23 ENG. REP. 111

being liable to legal proceedings in consequence of making the gas:

Held, that the company was not justified in causing a nuisance even if the gas could not be made of the requisite purity without so doing.

2. But *held*, on the evidence, that it was not shown that by greater care and expense the nuisance might not be avoided.
3. *Quare*, on the construction of the acts, whether the company was under an obligation to supply gas. *Attorney General v. Gaslight, etc.* 533

See MILITARY OFFICER, 120, 129 note.

O.

OFFICERS.

See MILITARY OFFICER, 120, 129 note.

OPINION.

1. In an action against a vendor for misrepresentation on the sale of goods, if it is shown that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, he cannot be asked in chief whether he believed the representation to be true. *Hine v. Campion*. 629, 630 note.

OWNERS.

1. The occupiers of lands under the copyholders of a manor claimed, and by a by-law were declared entitled to, certain rights of common over the lands of the manor. Part of the lands had been sold to a railway company, and the occupiers claimed to share in the purchase-money:
Held, that the claim could not be maintained. It could only be made by custom, by grant, or by prescription.

There could be no such custom giving a *profit a prendre in alieno solo*; there was no grant; and there could be no right by prescription, inasmuch as the claim would be against the owner of the land in respect of which the claim was made. *Austin v. Amhurst*, 816, 819 *note*.

See EMINENT DOMAIN, 272.

P.

PARENT AND CHILD.

See MAINTENANCE, 840, 849 *note*.

PAROL EVIDENCE,

See WILLS, 509, 511 *note*.

PARTIES.

See ASSIGNMENT, 483.

ATTORNEYS, 368, 376.

AUCTIONEERS, 92.

EXECUTORS AND ADMINISTRATORS, 525, 531 *note*.

MILITARY OFFICER, 120, 129 *note*.

TRUSTS AND TRUSTEES, 452, 457 *note*.

PARTITION.

1. By the decree in a partition suit a sale was directed of certain real estate, of which seven-eighths belonged to the plaintiff and one-eighth to the defendant, Mrs. Q., a married woman, in fee. The plaintiff having subsequently offered to purchase Mrs. Q.'s share, an order was made in chambers, on the application of all parties, directing that, Mr. and Mrs. Q. accepting £1,200 as the purchase-money for Mrs. Q.'s one-eighth, the plaintiff should pay the amount into court, which he did; but

before any conveyance was executed Mrs. Q. died, leaving two infant daughters her co-heiresses. Mr. Q. took out administration to her estate:

Held, that the £1,200 must be treated as realty by force of sect. 8 of the Partition Act, 1868, incorporating sections 23 to 25 of the Leases and Sales of Settled Estates Act, and therefore belonging to the co-heiresses, subject to Mr. Q.'s life interest as tenant by the curtesy.

2. Mrs. Q.'s solicitors obtained a charging order on the fund for their costs in the action under the Attorneys and Solicitors Act, 1860, s. 28, and afterwards a stop order. Having been served with proposed minutes of order on further consideration, they appeared by counsel and asked for their costs of obtaining the stop order and of their appearance:

Held, that they must bear their own costs of obtaining the stop order and of their appearance. *Mildmay v. Quicke*. 156

3. In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the court has jurisdiction under the Judicature Act, 1873, s. 25, subs. 8, to appoint a receiver until the hearing.

4. An estate consisting of a mansion house and 185 acres belonged to the plaintiff and the defendant in equal moieties. It was almost surrounded by a larger estate, of which the plaintiff was tenant for life, and with which it was formerly united as part of the same family estate. In an action for partition, or sale the plaintiff desired a partition under which the mansion house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate; he offering to pay what should be necessary for equality of partition. The defendant, who was also a neighboring landowner, desired a sale, and had offered, on the writ being issued, to submit to an immediate decree for sale:

Held, that, under sect. 4 of the Partition Act, 1868, as "no good reason to the contrary" of a sale had been adduced, a sale must be directed. *Porter v. Lopes*. 631

PARTNERSHIP.

1. Though an agreement is expressed to be an agreement for a loan to a partnership under sect. 1 of Bovill's Act, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the act and the declaration, is to give him the rights and impose on him the obligations of a partner.
2. The act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of the business. *Matter of Delhassé*, 672, 691 note.
4. The patentee claimed, first, a mode of applying rollers and runners to the footstand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as above described;
5. *Held*, that, assuming that there was nothing novel in the mode of securing the runners to the footstand, yet that the want of novelty in the second claim did not invalidate the patent, because the second claim must be read as claiming a subsidiary invention to be used only in connection with the principal invention. *Plimpton v. Spiller*. 42

PATENTS.

1. In order to invalidate a patent by prior book-publication, it is not enough to show that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the public.
2. Where a specification contains separate claims of two inventions, of which the second is to be used only in connection with and as subsidiary to the first, want of novelty in the second claim does not invalidate the patent.
3. In 1865 a patent for improvement in the construction of skates was granted to the agent of the inventor, who was a resident in America, and to whom the patent was afterwards assigned. Two years previously an American book containing a brief description of the invention (but not sufficiently particular to enable persons to manufacture the skates), and five weeks previously an American book of illustrations containing a drawing of the invention, were sent to the library of the Patent Office in London. This book of illustrations was not entered in the book of donations or in the catalogue, but it was placed on a bookshelf in a room open to the public, and was seen there by a librarian before the plaintiff's patent was taken out:

Held (affirming the decision of the Master of the Rolls), that there was no prior publication of the patent in this country.

PENALTY.

See INJUNCTION, 86, 91 note.

PER CAPITA.

See WILLS, 551, 820.

PERFORMANCE.

See COVENANT, 542, 759, 768 note.
VENDOR AND VENDEE, 92.

PERSONAL ESTATE.

See HEIRS, 787, 788 note.
REAL ESTATE, 102, 105 note.

PER STIRPES.

See WILLS, 551, 820.

PLAINTIFFS.

See EXECUTORS AND ADMINISTRATORS, 525, 531 note.

PLEA.

See ANSWER, 577.

PLEADING.

See ANSWER, 577.

COUNTER-CLAIM, 314, 318 note.

POWER.

1. A testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune on her death to her husband. She married in the testator's lifetime with his consent :

Held, that the provision was equivalent to a gift to the husband of the life interest. *Tweeddale v. Tweeddale*. 772

See INFANT, 820, 830 note.

PRECATORY TRUSTS.

See TRUSTS AND TRUSTEES, 492.

PREFERRED CREDITOR.

See EXECUTORS AND ADMINISTRATORS, 830.

PREFERRED DEBT.

See PRINCIPAL AND SURETY, 698, 702 note.

PRINCIPAL AND AGENT.

1. A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid.
2. By two contemporaneous building contracts made in 1868 between the plaintiff, a builder, of the one part, and C., vicar of the parish of St. Pancras, and A., incumbent of an ecclesiastical district within the parish, of the other part; after reciting that, under an act creating the district, C., or the vicar for the time being of St. Pancras, in conjunction with A., or the incumbent for the time being of the district, were

to apply a fund, payable to them by a railway company, in building a church and parsonage for the district; it was witnessed that in consideration of sums amounting together to the whole of the available building fund, to be paid to the plaintiff by C. and A., "their executors or administrators, or the person or persons for the time being entitled to apply the said fund under the said act," the plaintiff agreed with C. and A., "and with such person or persons as aforesaid," and C. and A., "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did agree with the plaintiff;" then followed provisions under which the plaintiff was to build the church and parsonage in accordance with plans and specifications; and a clause stipulating that the consideration moneys should be paid in manner provided by the specifications. The specifications provided for monthly payments on account of the contracts; also that the architect might order additional works; and that payments for additional works were to be made on the completion of the entire works.

In June, 1869, C., having obtained preferment, ceased to be vicar of St. Pancras, by which time the whole of the building fund had been exhausted. The buildings were completed in June, 1870.

In February, 1875, C. died, whereupon the plaintiff brought an action against his executors to recover a sum alleged to be due for "extras" under the contracts:

Held (1), that the liability of C. and A. respectively under the contracts was restricted to the period during which they were respectively vicar and incumbent, and therefore that C.'s liability terminated on his ceasing to be vicar; and (2), that in any case the liability of C. and A. extended only to the amount of the building fund, and no further. *Williams v. Hathaway*. 143, 151 note.

See ANSWER, 577.

AUCTIONEERS, 92.

DIRECTORS, 157.

INFANT, 820, 830 note.

UNDUE INFLUENCE, 241, 252 note.

PRINCIPAL AND SURETY.

1. Where the secretary of a benefit building society established and certified under 6 & 7 Will. 4, c. 32, and whose rules provided that the secretary's accounts should be regularly presented and audited, had misappropriated the moneys of the society that came into his hands, and died leaving his estate insolvent:

Held, that under sect. 12 of 4 & 5 Will. 4, c. 40, the building society was entitled to be paid out of the estate the amount of the defalcations in priority to other creditors, and that the want of due diligence on the part of the society in examining the accounts was no bar to the claim. *Moors v. Marriott*. 698, 702 note.

See GUARANTY, 477, 482 note.

PROFITS.

See PARTNERSHIP, 672, 691 note.

PROTEST.

See BILL OF EXCHANGE, 774.

R.

RATIFICATION.

See CORPORATIONS, 640, 642 note.

REAL ESTATE.

1. Purchase-money paid into court by a railway company under sect. 69 of the Lands Clauses Consolidation Act, 1845, for land of which an infant is absolutely seised in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heir-at-law.
2. The word "settled" in sect. 69 means simply "standing limited." *Kelland v. Pulford*. 102, 105 note.

3. Devise and bequest of freehold and copyhold land and personal estate to A. and B., upon trust as to the land for sale, and as to the personalty to realize the same, and to stand possessed of the proceeds upon trust for C. M., who was his heir-at-law, absolutely. A. predeceased the testator; B. renounced probate, and died three years afterwards, not having acted as trustee, though he did not disclaim the trusts, and letters of administration with the will annexed were granted to C. M. From and after the testator's death C. M., through his agent, received the rent of the land, but did not exercise any other act of ownership. No one was admitted tenant of the copyhold. The land was let from year to year, and there was one change of tenancy effected by the agent. On the death of C. M., who survived the testator nearly nine years, the question arose whether the land was to be treated as real estate:

Held, that on B. renouncing probate, the legal estate devolved on C. M., and that, whether the legal estate was outstanding or not, C. M. must be taken to have elected to take the land as real estate. *Roberts v. Gordon*. 136, 143 note.

4. A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death. *Meek v. Devenish*. 168

5. A debenture mortgage made by a railway company in the form given in Schedule C of the Companies Clauses Consolidation Act, 1845, does not give the debenture holder an interest in land within the Statute of Mortmain. *Mitchell v. Moberly*. 258

See EMINENT DOMAIN, 272.
Heirs, 787, 788 note.

REDEMPTION.

1. In a redemption suit by a second mortgagee against the first mortgagee the defendant is bound to state in answer to interrogatories not only the amount due upon his security, but also what

securities he holds for his debt. *West of England, etc., v. Nickolls.* 206,
211 note.

2. In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the court, and depends on the circumstances of each particular case. *Campbell v. Holyland.* 483

3. In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances"; but, to entitle him to "permanent improvements," or "substantial repairs," he must make out a case for them at the trial. *Tipton, etc., v. Tipton, etc.* 505

See CHATTEL MORTGAGES, 495, 498 note.

REFORMATION OF CONTRACTS.

See ATTORNEYS, 363, 376 note.

REMAINDER.

See WILLS, 789.

REMAINDERMEN.

See LIFE ESTATE, 253.
TRUSTS AND TRUSTEES, 280.

RENT.

See BANKRUPTCY, 469.
CORPORATIONS, 306, 793.

REPAIRS.

See REDEMPTION, 505.

RES ADJUDICATA.

See HUSBAND AND WIFE, 649.

RESALE.

See MORTGAGE FORECLOSURE, 483.

RESCISSION.

See FRAUD, 390, 395 note.

RESTRAINT OF TRADE.

See COVENANT, 542.

REVERSIONER.

See LIFE ESTATE, 253.

S.

SATISFACTION.

See SPECIFIC PERFORMANCE, 808, 812 note.

"SEIZED."

See WILLS, 106.

SET-OFF.

See COUNTER-CLAIM.

SETTLEMENT.

1. By an ante-nuptial marriage settlement the intending husband covenanted that in case at any time during the joint

lives of the husband and wife any future portion or real or personal estate whatsoever exceeding a specified sum should come to or devolve upon the wife, or the husband in her right, by or under the will of a person named, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the husband and all other necessary parties would from time to time effectually settle or concur with the wife in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, in manner therein mentioned :

Held, that a fund to which at the date of the settlement the wife was entitled contingently on the happening of two events which happened during the coverture was bound by the covenant. *Matter of Michell's Trusts.* 224

2. A covenant to settle after-acquired property will, in the absence of indications of a contrary intention, be read as limited to the duration of the coverture, and this though the covenant relates only to property from a specified source. *Matter of Campbell.* 267

SHAREHOLDERS.

See STOCKHOLDERS.

SHELLEY'S CASE.

See WILLS, 519.

SOLICITORS.

See ATTORNEYS, 607.

SPECIFIC PERFORMANCE.

1. By a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a cer-

tain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties :

Held, that there was no final agreement of which specific performance could be enforced against the defendant. *Winn v. Bull.* 379, 382 *note*.

2. The plaintiff offered to take a lease of a farm belonging to the defendant at a rent of £500 per annum, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 249 acres. The defendant's agent desired to let only 214 acres with this farm, but he accepted the plaintiff's offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the defendant's agent admitted in examination that he thought the plaintiff had tendered for the same quantity of land as the former tenant. The plaintiff commenced an action for specific performance against the defendant, and was willing to take a lease of the 214 acres at a proportionately reduced rent :

Held, that the defendant must grant the plaintiff a lease of 214 acres at a rent reduced from £500, in the proportion of 214 to 235. *McKenzie v. Heaketh.* 801

3. A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor" :

Held, that, in the absence of *male fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title. *Hudson v. Buck.* 808, 813 *note*.

See FRAUD, 390, 395 *note*.

STOCKHOLDERS.

1. A company was formed under the act of 1856, with a capital of £160,000 divided into £10 shares, and the memorandum stated that the liability of the

shareholders was limited. The articles provided that certain debts of specified amount which had been incurred by six of the shareholders in forming the company should be paid by the company, and that if the company should not have sufficient funds to pay them, each shareholder for the time being should contribute and pay to the company a proportionate amount of those debts according to the number of shares of each shareholder. The shares were not all allotted. The company having been ordered to be wound up:

Held, by Malins, V.C.: 1. That the agreement to contribute to these debts was legal, and could be enforced by a call, though the shares had been fully paid up. 2. That each shareholder must contribute a sum bearing to the whole of the debts the same proportion as the number of his shares bore to the whole number actually allotted. 3. That if any of the shareholders were insolvent, the solvent shareholders must contribute *pro rata* the amounts which the insolvent shareholders failed to pay. 4. That the six shareholders were not entitled to interest upon large sums which they had paid for interest on the debts.

2. *Held*, on appeal, that the decision of the Vice-Chancellor as to points 1, 2, and 4, ought to be affirmed; but that no shareholder was liable to pay any further proportion in consequence of the inability of any other shareholder to pay his proportion. *McKewan's Case*. 72, 85 *note*.

8. The articles of association of a limited company whose capital was divided into preferred and deferred shares provided that, subject to the difference in dividing the profits, the preferred and deferred shares should rank equally in the company, and that there should be no difference between a preferred and deferred shareholder in respect to his *status* and liability to the debts and engagements of the company. The articles also provided for the dissolution of the company. On the voluntary winding-up of the company under sect. 133 of the Companies Act, 1862:

Held, that the two classes of shareholders were in the same position, and entitled to the capital *pro rata*. *Grieff v. Paget*. 110, 116 *note*.

4. Shares in a limited company were issued as fully paid-up shares, by virtue of a contract not registered as required by the Companies Act, 1867, s. 25. The company issued certificates of these shares as fully paid-up shares. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid-up on the faith of the certificates. The company having been ordered to be wound up, the official liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid:

Held (reversing the decision of Hall, V.C.), that, as against a transferee who took the shares without notice that they had not been paid up in cash, the company was estopped by the certificates from saying that they had not been so paid up, and that the official liquidator was in the same position. *British, etc.* 692

5. In the case of an insurance company in liquidation, whose assets are limited as regards policyholders and unlimited as regards other creditors, sect. 38, sub-sect. 6, of the Companies Act, 1862, is only intended to protect the contributories as against the claims of the policyholders, and does not affect the liability of contributories who have not compromised their liabilities, under sect. 180, to pay the whole of the costs of the liquidation, although the whole of the nominal share capital has been called up.

6. The deed of settlement of an insurance company registered in 1854 under 7 & 8 Vict. c. 110, provided that every policy issued by the company should contain a proviso limiting the claims of the policyholder to the amount of the share capital, but left the liabilities of the shareholders in other respects unlimited.

All the policies issued by the company contained the required proviso.

In 1868 the company was ordered to be wound up.

During the liquidation the whole of the nominal share capital was called up, and several of the contributories compromised their liabilities by agreements with the liquidator in manner provided by sect. 180 of the Companies Act, 1862, and Rules of 1862, Sched. m, Form No. 50.

The liquidator having, for the purpose of raising a fund for the payment of the past and future costs of the liquidation, made a further call on those contributories who had not compromised :

Held, that those contributories were not entitled to require that the amounts received under the compromises should be marshalled between the liability for costs and the liability under policies; and that the contributories who had not compromised alone remained liable for the costs of the liquidation. *Matter of Accidental, etc.* 704

7. A company with unlimited liability was formed in 1843 under a deed of settlement, and was afterwards provisionally registered under 7 & 8 Vict. c. 110. By their deed of settlement no shareholder was to have more than twenty votes, however large the number of shares held, and the directors had power to approve or disapprove of any person proposed by a shareholder as a transferee of his shares. A difference arose among the shareholders as to the management of the company, and the plaintiff, who was a large shareholder, transferred some of his shares to one person for value, and other shares to another person as trustee for himself, in order to increase his voting power. The directors refused to approve of the transfers, not from any personal objection to the transferees, but on the ground that the transfers were colorable, and were intended to increase the votes of the transferor :

Held, that the company was not a mere partnership, but came within the laws applicable to joint stock companies; and that the directors had no power to refuse a transfer, which was a right of property, except upon personal objection to the transferee. They were therefore ordered to approve of the transfers.

8. An inquiry was also directed as to damages. *Moffatt v. Farquhar.* 731, 752 note.
- See CORPORATIONS, 138 note, 232, 306, 414, 640, 642 note.
DIRECTORS, 464, 468 note.

STOPPAGE IN TRANSITU.

1. Goods were purchased of B. in London by A., residing at Falmouth. On the 23 ENG. REP. 112

27th of October, 1876, B. delivered the goods for shipment on a steamer calling at Falmouth, and on the same day posted an invoice to A. On the 29th of October the steamer left London, and on the 31st arrived at Falmouth, where the goods were discharged on the quay and taken to the warehouse of C., who was the agent of the Steam Packet Company, and in the habit of holding goods landed from the steamers at the risk and subject to the order of the consignees, and also with the exclusive right as between himself and the Steam Packet Company of delivering goods to the consignees.

On the 30th of October A. committed an act of bankruptcy by absconding from Falmouth, and on the 4th of November, 1876, he was adjudicated bankrupt.

On the 4th of November B. telegraphed instructions to C. not to deliver the goods :

Held, that the *transitus* had not ended on the arrival of the goods at Falmouth, and transfer to the warehouse of C., who, in the absence of instructions, held them as forwarding agent, and not as an agent for B. to keep the goods; and, accordingly, that the right of B. as unpaid vendor, to stop the delivery of the goods prevailed as against the claim of A.'s trustee in bankruptcy. *Matter of Barrow.* 349, 355 note.

SUBROGATION.

See REDEMPTION, 206, 211 note.

SURETY.

See PRINCIPAL AND SURETY.

T.

TITLE.

See EMINENT DOMAIN, 272.

TRADE-MARK.

1. On the granting of an injunction to restrain the infringement by the prin-

cipal defendant of the plaintiff's trade-mark:

Held, that the plaintiff was entitled to alien for his costs of the action upon goods marked with the spurious mark which were in the hands of a wharfinger (a defendant) who had received them from the principal defendant in the ordinary course of business without knowledge of any fraud, and that this lien was superior to any lien of the wharfinger in respect of his charges, and to any rights of the trustee in bankruptcy of the principal defendant, who had become bankrupt since the commencement of the action :

2. *Held*, also, that as the wharfinger had not unequivocally submitted to the order of the court, but had insisted on the priority of his lien on the goods in respect of his charges, he had lost his right to be paid his costs of the action by the plaintiff, and must, on the contrary, be made jointly liable for the plaintiff's costs of the action. *Moet v. Pickering*. 334

3. A single letter cannot be registered as a trade-mark under the Trade-Marks Registration Acts. *Matter of Mitchell*. 386

See INJUNCTION, 182.
NAME, 175, 182 *note*.

TRESPASS.

See INJUNCTION, 182.
CONDITION, 292.

TRUSTS AND TRUSTEES.

1. When vendor is for purchaser so as to require to relet for benefit of purchaser. *Egmont v. Smith*. 92, 100 *note*.
2. When and how far liable for negligence in investing and managing trust estate. *Job v. Job*. 162, 165 *note*.
3. A testator vested his freeholds, copyholds, and leaseholds for lives or years determinable upon lives, in trustees in trust for his son, who was one of the trustees, for life, with remainder to his eldest son in tail. There was a trust to renew leaseholds for lives, but not for

years. The tenant for life purchased the reversion in fee of a lease for lives, part of the settled estates (his own life being one), and the fee was conveyed to himself and co-trustee upon the trusts of the will, no intention being declared that the purchase-money was to enure for the benefit of those entitled under the will:

Held, that the estate of the tenant for life was entitled to the purchase-money, with interest from his death.

4. A tenant for life and sole trustee of settled estates, by will, purchased reversions in fee of leases for lives (his own life being one) and for years, parts of the settled estates, and the estates were conveyed, as to the reversion of the lease for lives, to him upon the trusts of the will; as to one of the reversions of the leases for years to him absolutely; and as to the other reversion of the leases for years to him upon the trusts of the will. He died while the leases for years would have been running out, and without having declared any intention that the purchase-moneys were to enure for the benefit of those entitled under the will. The first tenant in tail died in the tenant for life's lifetime intestate, leaving a widow, and a son heir in tail:

Held, that as to all the reversions purchased, the estate of the tenant for life was entitled to be repaid the purchase-moneys; that as regarded the legal personal representative of the first tenant in tail, both the estates of which there had been leases for years must be treated as being subject to those leases for the benefit of his first tenant in tail's estate; that as to the estate conveyed to the tenant for life absolutely, it belonged to the legal personal representative of the first tenant in tail; and that as to the other estate conveyed to him upon the trusts of the will, she was entitled to a leasehold interest of the same extent as the term would have conferred. *Isaac v. Wall*. 280

5. Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due from him to the defendant. The other trustee filed a bill against the defen-

dant, alleging that the security was insufficient, and asking that the security might be realized, and that the defendant might make good any deficiency:

Held (affirming the decision of Fry, J.), that the plaintiff had no equity to make his co-trustee primarily liable; and that the court would not direct a sale of the property in the absence of the *cestuis que trust*. *Buller v. Buller*. 452, 457 note.

6. Where a precatory trust has been created by will in favor of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use. *Willis v. Kymer*. 492

7. The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately, and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:

Held (reversing the decision of Lord Romilly, M.R.), that the trustee was entitled to be paid his costs out of the estate as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. *Walters v. Woodbridge*. 666

See CHARITY, 882.

CORPORATIONS, 1, 38 note.

DIRECTORS, 157.

FRAUDS, STATUTE OF, 407.

REAL ESTATE, 136, 143 note, 168.

UNDUE INFLUENCE, 241, 252 note.

WILLS, 661.

U.

UNDERTAKING.

See DISCONTINUANCE, 852, 853 note.

UNDUE INFLUENCE.

1. To prevent the operation of the rule that a solicitor shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation, or even suspicion, but there must be a severance of the confidential relation. *Morgan v. Minett*. 241, 252 note.

See ATTORNEYS, 765.

USUAL COVENANTS.

See LANDLORD AND TENANT, 708, 713 note.

V.

VENDOR AND VENDEE.

1. A vendor cannot object to convey to a purchaser in parcels by separate conveyances at one and the same time, if the purchaser requires him to do so and pays him the additional expense he thereby incurs; but *quarre*, whether, in the absence of any stipulation, the vendor cannot object so to convey if the purchaser requires the conveyances to be made at different times. *Egmont v. Smith*. 92

2. A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase-money, but the purchaser was not to be considered as accepting the vendor's title:

Held, that this clause had the same operation as the 85th section of the Lands Clauses Act (8 Vict. c. 18), and the purchaser was entitled, upon depositing the purchase-money, not only to take possession, but to pull down the

house, that being the object for which the purchase was effected.

3. Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required.

4. Where an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period except with the leave of the court. *Bolton v. London School Board*, 856

See DAMAGES, 92, 100 *note*.

VESTED INTERESTS.

See WILLS, 190.

W.

WAIVER.

See CONDITION, 565, 576 *note*.
COVENANT, 539, 759, 763 *note*.

WARRANTY.

See COVENANT, 542.

WATER AND WATERCOURSES.

1. The owner of a mine, who by means of a pit or shaft intercepts water which previously flowed in unascertained underground channels, is not entitled by any means not in the ordinary and proper course of working his mine to cast the water thus intercepted upon the land of his neighbor, even though, if the water had not been thus inter-

cepted, it would have flowed naturally upon that neighbor's land.

2. By intercepting the water the person who digs the pit or shaft makes the water his own property, and must take the burden as well as the benefit of it. And if he afterwards casts it wrongfully on his neighbor's land, he will be liable for the damage thus done to him. *West Cumberland, etc., v. Kenyon*, 836, 845 *note*.

WAY.

See INJUNCTION, 703, 707, *note*.

WHARFINGER.

See TRADE-MARK, 334.

WILLS.

1. A testator gave all that part of Rigby's estate purchased by him consisting of closes A, B, C, D, E, and F, with the timber and coal mines, to trustees in trust for his son J. O. for life, with remainder to the use of J. O.'s children as he should by deed or will appoint, and in default of appointment to the use of J. O.'s right heirs. J. O., by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of Rigby's estate purchased by his said father consisting of A, C, B, and F, with the timber, but not including the mines, to his two sons T. and J.; and he appointed the mines under the land which he had appointed to T. and J. to his four other children. The two omitted closes, D, and E, lay between the other four.

A special case having been filed to obtain the opinion of the court whether the two closes D, and E, passed under the appointment to T. and J.:

Held (affirming the decision of the Master of the Rolls), that the corpus of the estate devised by the father was sufficiently designated in the son's will,

that the enumeration of the four closes instead of the six was a *fauxa demonstratio* which might be rejected; and that the whole of the six closes passed under the appointment. *Travers v. Blundell*. 63

2. R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession, having devised to L. "all real estate (if any) of which she might die seised."

An action having been brought by L. against the widow's devisees for recovery of possession, the devisees demurred to the statement of claim on the ground that A.'s devise did not pass the property or any right of entry therein to the plaintiff:

Held, that "seised" being a purely technical word must be construed according to its technical meaning; and that as the seisin in law which A. had on R.'s death had been destroyed, and she had not at her death any seisin either in law or in fact, the property did not pass under her devise. *Leach v. Jay*. 106

3. A testator directed his trustees to pay his son £3,000 and to invest £28,000 upon trust as to £10,000 for his widow during widowhood, and as to six sums of £3,000 upon trust for his daughters and their children. The £10,000 was to fall into the residue at the death or marriage of his widow. And the testator directed his trustees to divide the residue into as many equal shares as he should have children living at the time of the death or second marriage of his wife, or then dead leaving issue, and upon trust as to one of such shares to invest £1,000 for his son and his son's widow and children, and he gave directions as to the settlement of the share given to one of his daughters; and the will provided that any money advanced to his children and not repaid at his death should be set off against their share of the residue. The testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:

Held, that the legacy of £3,000 to the

son was not to be set off against his debt, but was to be paid immediately:

4. *Held*, also, that the words in the will directing the residue to be divided between the children living "at the death or second marriage of his wife" must be struck out as being manifestly inconsistent with the form of the will and the intention of the testator; and that all the children living at the death of the testator took vested interests in the residue. *Smith v. Crabtree*. 190

5. A testatrix devised lands to her daughter S. for life, with remainder to the husband of S. for life, and after the death of the survivor of them to all the children of S. by her then husband who should be living at testatrix's death as tenants in common in fee, and added a proviso giving over the shares of any of the children of S. who should "depart this life without leaving lawful issue" to the survivors or survivor of the children that should leave such lawful issue as tenants in common in fee:

Held, that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz., the death of the surviving tenant for life. *Beasant v. Cox*. 201

6. A testator left a legacy to the children of his daughter by any husband other than Mr. Thomas Fisher, of Bridge Street, Bath.

There was a Mr. Thomas Fisher, of Bridge Street, Bath, who was a married man.

There was also a Henry Tom Fisher, son of the above, who sometimes lived with his father:

Held, that although Mr. Thomas Fisher answered the description, and his son's name was not Thomas but Tom, parol evidence of the above circumstances might be admitted to show which was intended. *Matter of Wolvorton's Estate*. 509, 511 note.

7. The principles governing the application of the rule in *Shelley's Case* are the same in the case of wills as in the case of deeds. *Matter of White*. 519

8. A bequest to the corporation of T. of a sum of £3,000 Consols, of which £1,000 was to be expended "in the

erection of a dispensary, which is so urgently needed there," and the remaining £2,000 to be invested as "an endowment fund for the said dispensary":

Held, void under 9 Geo. 2, c. 36, although the corporation held land in mortmain at T. which was available for the purposes of the bequest. *Coz v. Davies*. 521

9. A testator gave his residuary estate to trustees in trust for all his children equally and directed that the shares of his sons should be paid to them at the age of twenty-five, and that the shares of daughters should be settled in trust for them for life for their separate use, and after their death in trust for the issue of such as should leave issue; and in case of the death of any of his sons before attaining twenty-five, or of any of his daughters without issue, or having issue, all such issue should die, being sons before twenty-five or daughters before twenty-one or marriage, the share or shares of him or them so dying should go in equal shares to the testator's "surviving children" in the same manner as the original shares.

The testator left three sons, all of whom attained twenty-five, and three daughters, all of whom married.

On the death without issue of one of the daughters whose share was to be distributed, one brother was still alive, and two brothers and two sisters were dead, and both of these sisters had left issue still living:

Held, by Jessel, M.R., that surviving children meant those who were surviving either personally, or, in the case of the daughters whose shares were settled, by their stocks; and that the surviving brother and the issue of the two deceased sisters were entitled to the fund.

10. But *held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that "surviving" meant "other," and that the fund was divisible in fifths among all the brothers and sisters of the deceased daughter. *Lucena v. Lucena*. 551
11. A testator gave one fourth of a fund to one of his four daughters by name for life, and after her death to her children then living, but if she left no child, then he directed t^l at the interest

should be paid to his other daughters then living and the survivors and survivor of them, and after the decease of the last survivor he directed the same fourth share to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statutes for the Distribution of Intestates' Estates." He declared similar trusts of the other fourth shares respectively in favor of his other three daughters respectively and their respective children, with the same ultimate limitations. One daughter died after the testator, leaving children; the other three afterwards died without issue:

Held, by Bacon, V.C., that the class of next of kin was to be ascertained at the death of the last surviving daughter.

12. *Held*, on appeal, that the class was to be ascertained at the death of the testator; and that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters. *Mortimer v. Slater*. 611

13. A testator, after reciting that his son was "how indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator:

By a codicil the testator released the son from another specified debt for moneys misappropriated by the son:

Held (reversing the decision of Malins, V.C.), that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by the testator between the date of his codicil and of his death. *Everett v. Everett*. 653, 659 note.

14. By the custom of the manors of Y., P., and S., the tenant of a copyhold tenement held only for life, with a

power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees to the use of his grandson A. for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of A. and their heirs as tenants in common, with remainder to the use of the plaintiffs. By a codicil the testator, after reciting that he had ascertained that his "said copyhold estates" were held of the manors of P. and S., directed that "all his said copyhold estates within the manor of P. and S." should be held by his said trustees to the uses and upon the trusts in his said will declared, if and so far as the customs of the said respective manors would warrant or authorize; and if the custom of the said manors or either of them did not warrant or authorize the entail created by his said will, then and in that case his said grandson A. and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the said manors. A. was admitted tenant for his life, and nominated the defendant as his successor, who was admitted accordingly. On a bill filed by the plaintiffs to carry into effect the trusts of his will:

Held, first, that the trustees took the legal estate in the copyholds held of the manor of Y., and ought to have been admitted instead of A., and that all the beneficial limitations in the will were equitable interests. Secondly, that the codicil had no reference to the copyholds held of the manor of Y.; and that even if it did refer to them, it did not revoke the equitable limitations of the will. Thirdly, that although by the custom of the manor the tenements were only held for life with power of nominating a successor, the testator had power to dispose of the equitable inheritance by giving successive equitable interests. *Allen v. Beuuey*. 661

15. A testator devised lands to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one, as tenants in common in fee, with remainders over; and

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16. Where there is a testamentary gift to such of a class as might be living at the death of a tenant for life, and the issue of such of them as might be then dead "leaving issue," the issue of such members of the class as die leaving any issue will take whether they survive their parent or not. *Matter of Smith's Trusts*. 793

17. A testator devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund and be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. And, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, and afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren and to their heirs and assigns, to be divided equally among them:

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19. Where there is a time fixed at which a fund is to be divided into separate shares, each share stands separate, and the gift of any share will take effect if the disposition of that particular share does not violate the rule against perpetuities, and will not be made void by the invalid gift of a portion of another share to the donee of the first-mentioned share. But where there is a gift to a class and the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is void.

20. A testatrix made a bequest in trust for such of her four nephews and nieces as should be living at the expiration of twelve months after the death of their mother, and the issue then living who should attain the age of twenty-one years, of any of the nephews and nieces who should have died before the expiration of the twelve months:

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- " A. held B.'s collaterals as security for payment of B.'s indebted-

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- ness. C. indorsed B.'s note, discounted by A. Held, C. was entitled to be subrogated to A.'s rights as against a note by B. A. subsequently *bought*, and also as against any of B.'s notes subsequently discounted by A., XXIII, 218.
- " if valid obligation discharged by usurious one, may be revived if usurious one repudiated, XXIII, 218.
- " so if junior mortgagee pays prior one, and then takes usurious mortgage for both, XXIII, 218.
- " to bill to redeem, owners of equity of redemption necessary parties, XXIII, 218.
- " A. mortgaged property. He died devising half to B. and half to C., charging each with an annuity to *his* widow. B.'s widow paid the mortgage and took an assignment of it. Held, that B.'s annuity being paid and his widow offering to pay the arrears of C.'s, A.'s widow was not entitled to redeem the mortgage, XXIII, 218.
- " a bill can only be filed against the mortgagee to redeem his mortgage, but may pursue other parties for relief consequent upon such redemption, XXIII, 218.
- " where mortgagor sold mortgaged property, taking collateral from purchaser for payment of part of mortgage, the purchaser may sue mortgagor and mortgagee for redemption, XXIII, 218.
- " what relief must ask in such case, XXIII, 218.
- " creditor on payment of judgment by surety may assign his judgment, leaving debtor to set up that such payment extinguished the judgment, XXIII, 219.
- " if surety sues for such assignment, principal debtor a necessary party, XXIII, 219.
- " creditor may be subrogated to rights of surety under a mortgage, not necessary to exhaust his legal remedies, XXIII, 219.
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- " party asking subrogation cannot demand *assignment*, XXIII, 219.
- " only *sureties* can demand that, XXIII, 219.
- " if one not personally liable on a mortgage pays it to save his estate, presumed made for that purpose, no assignment necessary, and need not prove intended to keep it alive, XXIII, 219.
- " holder no right to insist upon discharging; though party redeeming not entitled to assignment may insist shall not be discharged, XXIII, 219.
- " tender by junior mortgagee must be made in unmistakable terms, so as to leave no doubt of intent to satisfy and discharge senior mortgage not to redeem, and have a transfer of it, XXIII, 219.
- " payment of prior mortgage vests equitable title thereto in party paying, XXIII, 219.
- " if owner gives *assignment* impliedly warrants title, and if invalid bound refund purchase-money, XXIII, 219.
- " in Upper Canada owner bound to *assign*, XXIII, 219.
- " Millard v. Cheesebrough, 1 Johns. Chy., 409, considered, XXIII, 219.
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- " unless owner by representing has title, induces bid, XXIII, 220.
- " though misrepresentation must be as to *fact* not known to purchaser; if honestly made and defect appears in abstract purchaser has, not fraudulent misrepresentation, XXIII, 220.
- " misrepresentation must be by party and not by sheriff, XXIII, 220.

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- " sheriff not liable for statement title good, unless fraudulently made, XXIII, 220.
- " doctrine of *caveat emptor* applies to sheriff's sales ; purchaser gets no better title than judgment creditor would have taken, XXIII, 220.
- " if judgment creditor agreed subsequent mortgage should have preference, purchaser so takes title, XXIII, 220.
- " assignee of mortgage takes benefit of such an agreement, XXIII, 220.
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